United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE ROBB.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1909.

No. 1992.

630

MARY A. JAQUETTE, EXECUTRIX OF THE ESTATE OF ISAAC G. JAQUETTE, DECEASED, APPELLANT,

vs.

CAPITAL TRACTION COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 15, 1909.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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MARY A. JAQUETTE, EXECUTRIX OF THE ESTATE OF ISAAC G. JAQUETTE, DECEASED, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 19, 1909.

In the Court of Appeals of the District of Columbia.

No. 1992.

MARY A. JAQUETTE, Executrix, &c., Appellant,
vs.
CAPITAL TRACTION CO., &c.

a Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of the Estate of Isaac G. Jaquette, Deceased, Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed February 21, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of the Estate of Isaac G. Jaquette, Dec'd, Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

First Count.

The plaintiff, Mary A. Jaquette, Executrix, of the estate of Isaac G. Jaquette, deceased, duly appointed by the Supreme Court of the District of Columbia, holding a Probate Court, and duly qualified

as such executrix, resident of the City of Washington, District of Columbia, sues in her said representative capacity the defendant Capital Traction Company, a body corporate created and existing under and by virtue of an act of the Congress of the United States and doing business in the city of Washington, District of Columbia, as a carrier of passengers for hire on street cars drawn or propelled along certain streets and avenues, in said city and District, by what is, or is known as, an underground electric system; for that heretofore, to wit: on the twenty-fifth day of December, 1906, the defendant was, and for a long time prior thereto had been, engaged in said business of carrying passengers for hire on street
2 cars drawn or propelled by electric power aforesaid, by said defendant company, along certain streets and avenues in said city and District, and, particularly, among said streets and avenues, the following, to wit: on and along Fifteenth Street west between Pennsylvania Avenue northwest and New York Avenue northwest, and on and along said New York Avenue northwest from and between Fifteenth Street west and Fourteenth Street west, and northward on said Fourteenth Street west: and as such carrier of passengers for hire, and manager and propeller of said street cars on said streets and avenues, as aforesaid, the said defendant company at said date had and maintained a certain transfer place, point or station near the intersection of said Fifteenth Street west and New York Avenue, northwest, between G Street North and said New York Avenue, where said defendant company stopped its said cars, running on the aforesaid streets and avenues, and transferred certain of its passengers from its Georgetown and Navy Yard or Pennsylvania Avenue cars to its said Fourteenth Street cars, and *vice versa* as the case might be: that as such carrier of passengers for hire, and in consideration of its franchise, license and privilege to occupy and use the said public streets and avenues for its said cars and business, for its own gain, profit and emolument, and to occupy and use such transfer place, point and station on said public streets and avenues in its said business, it was, and is, the duty and obligation of the defendant, its officers, agents, motormen, conductors and servants, to so manage, operate and control its said street cars, propelled and drawn as aforesaid, in running,
3 stopping and starting the same, and to furnish such proper and safe appliances on and for such street cars, that all persons, including the plaintiff's testator, could alight from and get on said street cars, and travel upon and use the said public streets and avenues; in crossing the same and otherwise, and particularly at said transfer place, point and station, occupied and used as aforesaid by defendant company, with safety to life and limb, and it was the especial duty of defendant company, its officers, agents and employees, to exercise at said transfer place, point and station, more than ordinary care, diligence and vigilence to safeguard and not endanger the life and limb of its said passengers, and intending passengers, and all other persons, in their rightful use of said street cars and of said public streets and street crossings, including plain-

tiff's testator: yet, notwithstanding the duty and obligation imposed upon the defendant company, its officers, agents and servants aforesaid, to exercise such due care, diligence and vigilence, as aforesaid, in the running and furnishing safe appliances of and for its said street cars, but in entire and total disregard and neglect thereof, the plaintiff says, that on the day and year aforesaid, at the hour of, to wit: 12:30 P. M., the defendant company knowingly furnished and had in use, as part of its car equipment upon its said street cars running on said streets and avenues, a certain unsafe and dangerous appliance known as and called a fender, attached to the front body, dashboard or platform of said street or motor cars and extending a distance of to wit: about four feet in front of said
4 defendant's cars, at a height of to wit: about six inches above the ground and car track: that on said day and date, at the time aforesaid, defendant company ran and propelled one of its said Fourteenth Street cars, going south from New York Avenue, northwest, down, on and along said Fifteenth Street west to said transfer place, point and station between said G Street north and New York Avenue, northwest, where said car of defendant was stopped on the west track, alongside of another of defendant's cars, northbound, standing on the east track; that the said unsafe and dangerous appliance known as and called a "fender," was attached to the said front part of said Fourteenth Street car, and was recklessly, carelessly and negligently permitted and caused, by the defendant's agents and servants, to extend slightly beyond the rear end of said northbound car of defendant, there standing, to wit—two feet: that the plaintiff's testator, Isaac G. Jaquette, deceased, among others, in the proper and careful exercise of his right, proceeded to cross said Fifteenth Street west, from its east to its west side, at or near the corner of said G Street, Northwest, and crossed to the rear of said northbound car of defendant, the said southbound Fourteenth Street car being concealed and hidden on the west side of said northbound car, from sight of persons on east side of said Fifteenth Street: that the said Isaac G. Jaquette, deceased, passed over said east track at the rear of said northbound car and proceeded to cross said west track, when the conductor, agent or servant of said defendant on said Fourteenth Street car, recklessly and without due and proper care and caution, and without regard
5 to the safety of plaintiff's testator, rang the go-ahead bell or signal to the motorman on said car to start the said car, and as plaintiff's testator, with due prudence and care, endeavored to escape from in front of said Fourteenth Street car, as it was in the act of starting, the said Isaac G. Jaquette was tripped up by said unsafe and dangerous "fender" and was thrown violently against said car and to the pavement and car track, and was seriously and fatally injured, his left leg being fractured at or near the hip joint and other injuries thereby sustained, from which mortal injuries, so caused by the recklessness, carelessness and negligence and want of due care of the defendant company, its agents and servants, as aforesaid, and without negligence upon his part, the said Isaac

G. Jaquette suffered and languished from said twenty-fifth day of December, 1906, to the fourth day of January, 1907, upon which day and date the said Isaac G. Jaquette, plaintiff's testator, so languishing, died in said city and District, in direct consequence of and as the result of and by reason of said mortal injuries by him so received, as aforesaid, through and by the aforesaid carelessness, negligence and fault of said defendant company, its agents and servants, in so placing said fender and negligently signalling said car to start, and without any negligence or want of proper care upon part of him, the said Isaac G. Jaquette, deceased. Whereby the plaintiff, executrix, and also the widow of said deceased Isaac G. Jaquette, sustained great damage, to wit: the sum of Ten Thousand ($10,000) dollars.

Wherefore the plaintiff brings this suit and claims damages against the defendant company in the sum of Ten Thousand
6 ($10,000) dollars: besides costs.

Second Count.

The plaintiff, Mary A. Jaquette, Executrix of the estate of Isaac G. Jaquette, deceased, duly appointed by the Supreme Court of the District of Columbia, holding a Probate Court, and duly qualified as such executrix, resident of the city of Washington, District of Columbia, sues in her said representative capacity the defendant Capital Traction Company, a body corporate created and existing under and by virtue of an act of the Congress of the United States, and doing business in the city of Washington, District of Columbia, as a carrier of passengers for hire on street cars drawn or propelled along certain streets and avenues, in said city and District, by what is, or is known as, an underground electric system; for that heretofore, to wit: on the twenty-fifth day of December, 1906, the defendant was, and for a long time prior thereto had been, engaged in said business of carrying passengers for hire on street cars drawn or propelled by electric power aforesaid, by said defendant company, along certain streets and avenues in said city and District, and, particularly, among said streets and avenues, the following, to wit: on and along Fifteenth Street west between Pennsylvania Avenue northwest and New York Avenue northwest, and on and along said New York Avenue northwest from and between Fifteenth Street west and Fourteenth Street west, and northward on said Fourteenth Street, west: and as such carrier of passengers for hire, and manager and propeller of said street cars on said streets and avenues,
7 as aforesaid, the said defendant company at said date had and maintained a certain transfer place, point or station near the intersection of said Fifteenth Street west and New York Avenue, northwest, between G Street north and said New York Avenue, where said defendant company stopped its said cars, running on the aforesaid streets and avenues, and transferred certain of its passengers from its Georgetown and Navy Yard or Pennsylvania Avenue cars to its said Fourteenth Street cars, and *vice versa* as the case may be: that as such carrier of passengers for hire, and in consideration of its franchise, license and privilege to occupy and use the said public

streets and avenues for its said cars and business, for its own gain, profit, and emolument and to occupy and use such transfer place, point and station on said streets and avenues, in its said business, it was, and is, the duty and obligation of the defendant, its officers, agents, motormen, conductors and servants, to so manage, operate and control its said street cars, propelled and drawn as aforesaid, in running, stopping and starting the same, and to furnish such proper and safe appliances on and for such street cars, that all persons, including the plaintiff's testator, could alight from and get on said street cars, and travel upon and use the said public streets and avenues, in crossing the same and otherwise, and particularly at said transfer place, point and station, occupied and used as aforesaid by defendant company, with safety to life and limb, and it was the especial duty of defendant company, its officers, agents and employers, to exercise at said transfer place, point and station, more than ordinary care,
8 diligence and vigilance to safeguard and not endanger the life and limb of its said passengers, and intending passengers, and all other persons, in their rightful use of said street cars and of said public streets and street crossings, including plaintiff's testator: yet, notwithstanding the duty and obligation imposed upon the defendant company, its officers, agents and servants aforesaid, in consideration of its said franchise and privileges, and under the laws and regulations in force in the District of Columbia, and generally as common carriers of passengers for hire in cities, to use great care in furnishing and equipping its said street cars and motors in said city and District, with safe and proper appliances for the protection and safeguarding of the public and all persons rightfully using the said streets and avenues, aforesaid, while walking upon and crossing the same in the ordinary use thereof, and not to carelessly and negligently furnish, maintain and use any unsafe or dangerous appliance or equipment, whatsoever, on and about said defendant's street and motor cars, the said defendant company knowingly, recklessly and negligently, and without exercising due and adequate care, did furnish and equip its said street and motor cars with an improper, inadequate, unsafe and dangerous contrivance and appliance known as and called a "fender," and did place and secure upon the front body, dashboard or front platform of its said cars said improper, inadequate, unsafe and dangerous fender so called: that said so-called fender was so attached as to extend the distance of to wit: four feet in front of said defendant's motor and street cars and at about the height of six inches
9 from the pavement and car track, and being kept, used and maintained in said position while moving and standing, the said so-called "fender" so negligently placed and maintained in said position, was a constant menace and trap and source of danger to pedestrians and travelers upon said streets and avenues, calculated to trip, trap and throw them, including plaintiff's testator, and to negligently and unlawfully endanger their life and limb, and not safeguard and protect them against danger and injury from said cars: and the plaintiff says that on, to wit: the said twenty-fifth day of December, 1906, at the hour of about 12:30 o'clock P. M., the said defendant company ran and propelled one of its said Fourteenth Street cars, going south from said New York Avenue northwest,

down, on and along said Fifteenth Street west to said transfer place, point and station between said G street north and New York Avenue, northwest, where said car of defendant was stopped on the west track, alongside of another of defendant's cars, northbound, standing on the east track; that the said unsafe and dangerous appliance known as and called a "fender," was attached to the said front part of said Fourteenth Street car, and was recklessly, carelessly and negligently permitted and caused, by the defendant's agents and servants, to extend slightly beyond the rear end of said northbound car of defendant, there standing, to wit: two feet: that the plaintiff's testator, Isaac G. Jaquette, deceased, among others, in the proper and careful exercise of his right, proceeded to cross said Fifteenth Street west, from its east to its west side, at or near the corner of said G Street, northwest, and crossed to the rear of said northbound
10 car of defendant, the said southbound Fourteenth Street car being concealed and hidden on the west side of said northbound car, from sight of persons on east side of said Fifteenth Street: that the said Isaac G. Jaquette, deceased, passed over said east track at the rear of said northbound car and proceeded to cross said west track, when the conductor, agent or servant of said defendant, on said Fourteenth Street car, recklessly and without due and proper care and caution, and without regard to the safety of plaintiff's testator, rang the go-ahead bell or signal to the motorman on said car to start the said car; and as plaintiff's testator, with due prudence and care, endeavored to escape from in front of said Fourteenth Street car, the said Isaac G. Jaquette was tripped up by said unsafe and dangerous "fender," and was thrown violently against said car, and to the pavement and car track, and was seriously and fatally injured, his left leg being fractured at or near the hip joint and other injuries thereby sustained, from which mortal injuries, so caused by the recklessness, carelessness and negligence and want of due care of the defendant company, its agents and servants, and without negligence upon his part, the said Isaac G. Jaquette suffered and languished from said twenty-fifth day of December, 1906, to the fourth day of January, 1907, upon which day and date the said Isaac G. Jaquette, plaintiff's testator, so languishing, died in said city and District, in direct consequence of and as the result of and by reason of said mortal injuries by him so received, as aforesaid, through and by the aforesaid carelessness, negligence and fault of said defendant company, its agents and servants, in furnish-
11 ing, maintaining and using said described fender and without any negligence or want of proper care upon part of him, the said Isaac G. Jaquette, deceased.

Whereby the plaintiff, executrix, and also the widow of said deceased Isaac G. Jaquette, sustained great damage, to wit: the sum of Ten Thousand ($10,000) dollars.

Wherefore the plaintiff brings this suit and claims damages against the defendant company in the sum of Ten Thousand ($10,000) dollars: besides costs.

Third Count.

The plaintiff, Mary A. Jaquette, Executrix of the estate of Isaac G. Jaquette, deceased, duly appointed by the Supreme Court of the District of Columbia, holding a Probate Court, and duly qualified as such executrix, resident of the city of Washington, District of Columbia, sues in her said representative capacity the defendant Capital Traction Company, a body corporate, created and existing under and by virtue of an act of the Congress of the United States, and doing business in the city of Washington, District of Columbia, as a carrier of passengers for hire on street cars drawn or propelled along certain streets and avenues in said city and District, by what is, or is known as, an underground electric system; for that heretofore, to wit: on the twenty-fifth day of December, 1906, the defendant was and for a long time prior thereto had been engaged in said business of carrying passengers for hire on street cars drawn or propelled by electric power aforesaid, by said defendant company, along certain streets and avenues, in said city and District, and, particularly,
12 among said streets and avenues, the following, to wit: on and along Fifteenth street west between Pennsylvania Avenue northwest and New York Avenue northwest, and on and along said New York Avenue northwest from and between Fifteenth Street west and Fourteenth street west; and northward on said Fourteenth street west; and as such carrier of passengers for hire, and manager and propeller of said street cars on said streets and avenues, as aforesaid, the said defendant company at said date had and maintained a certain transfer place, point or station near the intersection of said Fifteenth Street west and New York Avenue, northwest, between G Street north and said New York Avenue, where said defendant company stopped its said cars, running on the aforesaid streets and avenues, and transferred certain of its passengers from its Georgetown and Navy Yard or Pennsylvania Avenue cars to its said Fourteenth Street cars, and *vice versa* as the case might be: that as such carrier of passengers for hire, and in consideration of its franchise, license and privilege to occupy and use the said public streets and avenues for its said cars and business, for its own gain, profit, and emolument, and to occupy and use such transfer place, point and station on said public streets and avenues, in its said business, it was, and is, the duty and obligation of the defendant, its officers, agents, motormen, conductors and servants, to so manage, operate and control its said street cars, propelled and drawn as aforesaid, in running, stopping and starting the same, and to furnish such proper and safe appliances on and for such street cars, that all persons, including the plaintiff's testator, could alight and get on said street cars,
13 and travel upon and use the said public streets and avenues, in crossing the same and otherwise, and particularly at said transfer place, point and station, occupied and used as aforesaid by defendant company, with safety to life and limb, and it was the especial duty of defendant company, its officers, agents and employees to exercise at said transfer place, point and station, more than ordinary care, diligence and vigilance to safeguard and not endanger

the life and limb of its said passengers, and intending passengers, and all other persons, in their rightful use of said street cars and of said public streets and street crossings, including plaintiff's testator: yet, notwithstanding the duty and obligation imposed upon the defendant company, the officers, agents and servants aforesaid in consideration of its said franchise and privileges, and under the laws and regulations in force in the District of Columbia, and generally as common carriers of passengers for hire in cities, to use great care in furnishing and equipping its said street cars and motors in said city and District, with safe and proper appliances for the protection and safeguarding of the public and all persons rightfully using the said streets and avenues, aforesaid, while walking upon and crossing the same in the ordinary use thereof, and not to carelessly and negligently furnish, maintain and use any unsafe or dangerous appliance or equipment, whatsoever, on and about said defendant's street and motor cars, the said defendant company knowingly, recklessly and negligently, and without exercising due and adequate care, did furnish and equip one of its said street and motor cars, known as
14 a Fourteenth Street car with a certain defective, unsafe and dangerous contrivance and appliance known as and termed a "fender," which was out of proper repair, imperfect, inadequate and dangerous, as was well known or should have been known to the defendant company in the exercise of due and proper care upon the part of its officers, agents and servants, as common carriers of passengers in said city and District; that said defective, imperfect, out of repair and dangerous fender, so called, was negligently and improperly attached to the front body dashboard or platform of said Fourteenth Street car, and so placed as to extend about four feet in front of said defendant's car, and at a height of about ten inches from the pavement and car track on the right-hand side of said fender and at the height of about three inches from the pavement and car track on the left-hand side of said fender, going forward, and projecting out of line of said car on said left side: that said defective, imperfect, and dangerous fender was negligently placed, maintained and used in said position on said car by said defendant, its agents and servants, on the said twenty-fifth day of December, 1906, while it was standing and in motion, and being so placed and used the said defective and imperfect fender was a constant menace and source of danger to life and limb of pedestrians and travellers upon the aforesaid streets and avenues, including plaintiff's testator: that on said date at the hour of, to wit: 12:30 o'clock, P. M., the said Fourteenth Street car, so negligently equipped with said defective and unsafe fender, was run and propelled by defendant company from New York Avenue northwest down, on, and along
15 Fifteenth Street west to near the corner of G Street west, and was stopped between said G Street and New York Avenue, and near the corner of said G Street and Fifteenth Street northwest, at said transfer place, point and station, on the west side of one of defendant's cars there standing on the east track, northbound, to transfer passengers: that said Fourteenth street car was hidden and concealed by said defendant's car so standing on the east track, from

persons crossing said Fifteenth Street from its east side: That the said defective and dangerous fender aforesaid, attached to the front of said Fourteenth Street car, was recklessly, carelessly and negligently permitted and caused by the agent, conductor, motorman, and servants of defendant company, to extend beyond the rear platform of said northbound car a distance of, to wit: two feet, being a trap, menace and danger to persons attempting to cross said street in the rear of said northbound car of defendant: that the plaintiff's testator, on said day and date, and at said hour aforesaid, among others, in the careful and proper exercise of his right so to do, proceeded to cross said Fifteenth Street west, from its east to its west side, at the corner of said G street, north, and passed over the east car track at the rear of said northbound car and proceeded to cross said west track, when the conductor or servant of defendant on said Fourteenth Street car gave the signal to the motorman thereon to start said car, recklessly and negligently, and without regard for the safety of plaintiff's testator, who, in a proper, cautious and justifiable effort to escape injury from said car, had his foot caught by
16 said lower left end of said defective and dangerous fender, aforesaid, and plaintiff's testator, said Isaac G. Jaquette, was thereby thrown violently against said car, and to the pavement and car track, and received serious and fatal injuries from which he suffered and languished until the fourth day of January, 1907, upon which day he died, because of and from said injuries inflicted upon him through the said reckless, careless, and negligent conduct of the defendant company, aforesaid: and plaintiff says that by reason of the said reckless and negligent act of the conductor and servant of said defendant company, in signaling the starting of said car without regard to the safety of said Isaac G. Jaquette, and further the said negligent use of said defective fender, and the placing it as aforesaid, the said plaintiff's testator was so mortally injured and therefrom died, as aforesaid, through the fault and negligence of the defendant company, its agents and servants, and without want of due and proper care upon the part of the said Isaac G. Jaquette, deceased.

Whereby the plaintiff, Executrix, and also the widow of said deceased Isaac G. Jaquette, sustained great damage, to wit: the sum of Ten Thousand ($10,000) dollars: wherefore the plaintiff brings this suit and claims damages against the defendant company in the sum of Ten Thousand ($10,000) dollars: besides costs.

RICHARD P. EVANS,
FRED H. BENSON,
W. W. POULTNEY,
Attorneys for Plaintiff.

17 *Notice to Plead.*

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays after service hereof: otherwise judgment.

RICHARD P. EVANS,
FRED H. BENSON,
W. W. POULTNEY,
Attorneys for Plaintiff.

February 21st, 1907.

Motion to Amend Declaration.

Filed December 4, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of Isaac G. Jaquette, Deceased, Plaintiff,

vs.

CAPITAL TRACTION COMPANY, a Corporation, Defendant.

And now comes the plaintiff in above entitled cause, by her attorneys, and moves the court for leave to amend the declaration herein filed, by adding thereto, and making a part thereof the amendment herewith submitted as part of this motion, as an additional count to said declaration.

RICHARD P. EVANS,
FRED H. BENSON,
W. W. POULTNEY,
Attorneys for Plaintiff.

18 To R. Ross Perry and Sons, Esqrs., and G. Thomas Dunlop, Esq., attorneys for defendant.

DEAR SIRS: Please take notice that I will on Friday next the 6th inst., at the opening of the Court, or as soon thereafter as counsel can be heard, call up the foregoing motion to amend the declaration in this case.

Herewith please find copy of the proposed amendment to the declaration.

RICHARD P. EVANS,
FRED H. BENSON,
W. W. POULTNEY,
Attorneys for Plaintiff.

Service of copy of above motion and amendment acknowledged, this 4th day of November, 1907.

R. ROSS PERRY & SON.

Supreme Court of the District of Columbia.

FRIDAY, *December 6th,* 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

No. 49209. At Law.

MARY A. JAQUETTE, Ex'tr'x, Pl'ff,
vs.
CAPITAL TRACTION COMPANY, Def't.

Upon motion leave is hereby granted plaintiff to forthwith file an amendment to the declaration. Further upon motion of
19 defendant's attorneys the plea now on file herein is ordered to stand as to said declaration amended.

Amendment to Declaration.

Filed December 6, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of Isaac G. Jaquette, Deceased,
Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

Fourth Count.

The plaintiff Mary A. Jaquette, Executrix of the estate of Isaac G. Jaquette, deceased, duly appointed by the Supreme Court of the District of Columbia, holding a Probate Court, and duly qualified as such executrix, resident of the city of Washington, District of Columbia, sues in her said representative capacity the defendant Capital Traction Company, a body corporate created and existing under and by virtue of an act of Congress of the United States, and doing business in the city of Washington, District of Columbia, as a carrier of passengers for hire on street cars drawn or propelled along certain streets and avenues, in said city and District,
20 by what is, or is known as, an underground electric system: for that heretofore, to-wit: on the twenty-fifth day of December, 1906, the defendant was, and for a long time prior thereto had been, engaged in said business of carrying passengers for hire on street cars drawn or propelled by electric power aforesaid, by said defendant company, along certain streets and avenues in said city and District, and, particularly the following, to-wit: in and along Fifteenth Street west between Pennsylvania — northwest and New York Avenue northwest, and on and along said New York Avenue northwest from and between Fifteenth Street west and Fourteenth Street west, and northward on said Fourteenth Street, west: and as such carrier of passengers for hire, and manager and propeller of said street cars on said streets and avenues, as aforesaid, the said defendant company at said date had and maintained a certain transfer

place, point or station near the intersection of said Fifteenth Street west, and New York Avenue, northwest, between G Street north and said New York Avenue, where said defendant company stopped its said cars running on the aforesaid streets and avenues, and transferred certain of its passengers from its Georgetown and Navy Yard or Pennsylvania Avenue cars to its said Fourteenth Street cars, and *vice versa* as the case may be; that as such carrier of passengers for hire, and in consideration of its franchise license and privilege to occupy and use the said public streets and avenues for its said cars and business, for its own gain, profit and emolument, and to occupy and use such transfer place, point and station in said streets and avenues in its said business, and under the laws
21 and regulations in force in the District of Columbia, and generally as common carriers of passengers for hire in cities, it was the duty and obligation of the defendant, its officers, agents, motormen, conductors and servants, to so manage, operate and control its said street cars, propelled and drawn as aforesaid in running, stopping and starting the same, and to adopt and to furnish such proper, adequate and reasonably safe and improved appliances on and for such street cars, including fenders, and not to carelessly and negligently adopt, furnish, operate, maintain and use any unfit, inadequate, defective, unsafe or dangerous appliances or equipment whatsoever, including fenders, on and about said defendant's street and motor cars, so that all persons, including the plaintiff's testator, could alight from, approach and get on said street cars, and travel upon and use the said public streets and avenues, in crossing the same and otherwise, and particularly at said transfer place, point and station, occupied and used as aforesaid by defendant company, with safety to life and limb; and it was the especial duty of defendant company, its officers, agents and employees, to exercise at said transfer place, point and station, great care, diligence and vigilance to safeguard and not endanger the life and limb of its said passengers, and intending passengers, and all other persons in their rightful use of said street cars and of said public streets and street crossings, including plaintiff's testator: yet notwithstanding the plain duty and obligation imposed upon the defendant company, its officers, agents and servants aforesaid, in the premises, the said defendant
22 company on to-wit: December 25th, 1906, and prior thereto, knowingly, recklessly and negligently, and without exercising due and adequate care, did adopt, and furnish and equip its said street and motor cars with an unfit, inadequate and unsafe iron or steel contrivance and appliance known as and called a "fender," and did negligently place and operate upon and attach to the front body, dashboard or front platform of its said cars said unfit, inadequate and unsafe fender, so called; that said so called fender was so attached as to extend the distance of to-wit: four feet in front of said defendant's motor and street cars and at about the height of twelve inches from the pavement and car track, with an upward tilt: and being fixed, used, operated and maintained in said position, while moving and standing, the said unfit, inadequate and unsafe so called "fender" so negligently placed, maintained, and operated;

in said position was a constant menace and trap, and source of danger for passengers, pedestrians and travellers upon said streets and avenues, including plaintiff's testator, and was liable and disposed to trip, trap and throw them, and to negligently, needlessly, carelessly and recklessly endanger their life and limb, and not to adequately and reasonably safeguard and protect them against danger and injury from said car fender which was well known to defendant; and the plaintiff says that on, to-wit: the said twenty-fifth day of December, 1906, at the hour of about 12:30 o'clock P. M. the said defendant company ran and propelled one of its said Fourteenth Street cars, to-wit: car No. 111, going south from New York Avenue,
down, and along said Fifteenth Street west to said transfer
23 place, point and station between said G Street north and New
York Avenue, northwest, where said car of defendant was stopped on the west track, to-wit: alongside of another of defendant's cars north-bound, standing on the east track; that the said described unfit, inadequate and unsafe appliance known as and called a "fender," aforesaid, was attached to the said front part of said Fourteenth Street car, and was knowingly, recklessly, carelessly, negligently and unsafely fixed, operated, and caused by the defendant's agents and servants to extend beyond the front platform of said South bound car of defendant, there standing, the distance of to-wit: four feet, and the front part thereof about twelve inches above the pavement; that the plaintiff'- testator, Isaac G. Jaquette, deceased, to-wit: a passenger on said defendant's car, in the proper and careful exercise of his right, proceeded to cross said Fifteenth Street west, from its east towards its west side, on the street crossing at the corner of said G street, northwest, and passed at the rear of said northbound car of defendant, the said southbound Fourteenth Street car being, to-wit: shielded from view of persons on the east side of said Fifteenth Street by said north-bound car there standing: that the said Isaac G. Jaquette, deceased, purposing and intending to take passage on one of defendant's cars going south, passed over said east track at the rear of said north-bound car and proceeded to cross said west track, when to-wit: the conductor, agent or servant of said defendant, on said Fourteenth Street car, recklessly and without due and proper care and caution, and without regard to the safety of plaintiff's
testator, rang the go-ahead bell or signal to start the said car;
24 and as plaintiff's testator the said Isaac G. Jaquette in the exercise of proper caution, prudence and care, for his self preservation, endeavored to escape from in front of said Fourteenth Street car, the said Isaac G. Jaquette was tripped up by said unfit, inadequate and unsafe "fender" negligently extended, and operated, in front of said car, as aforesaid, and was thrown violently against said car and fender, and to the pavement and car track, and was seriously and fatally injured, his left leg being fractured at or near the hip joint, and other injuries thereby sustained and resulting; and but for said reckless, negligent, careless and improper maintenance, operation and use of said unfit and unsafe fender, extending in front of said car as aforesaid, while standing as aforesaid, the said Isaac G. Jaquette would not have been so tripped and thrown, and injured as

aforesaid: from which mortal injuries, so caused by the aforesaid recklessness, carelessness and negligence, and want of due care of the defendant company, its agents and servants in so furnishing, operating, using and maintaining said unfit inadequate and unsafe appliance and fender, as aforesaid, at the time and place, and in the manner aforesaid, and without negligence upon his part, the said Isaac G. Jaquette suffered and languished from said twenty-fifth day of December, 1903, to the fourth day of January, 1907, upon which day and date the said Isaac G. Jaquette, plaintiff's testator, so languishing died in said city and District, in direct consequence of, and as the result of, and by reason of said mortal injury to him *as* received, as aforesaid, through and by the aforesaid carelessness, negligence and fault of said defendant company, its agents and servants, which was the proximate cause thereof, and without any negligence or want of proper care upon part of him, the said Isaac G. Jaquette, deceased.

Whereby the plaintiff, executrix and also the widow of said deceased Isaac G. Jaquette, sustained great damage, to-wit: the sum of Ten Thousand ($10,000) dollars.

Wherefore the plaintiff brings this suit and claims damages against the defendant company in the sum of Ten Thousand ($10,000) dollars: besides costs.

RICHARD P. EVANS,
FRED H. BENSON,
W. W. POULTNEY,
Attorneys for Plaintiff.

Plea.

Filed March 16, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of the Estate of Isaac G. Jaquette, Deceased, Plaintiff,
vs.
THE CAPITAL TRACTION COMPANY, a Body Corporate, Defendant.

The Capital Traction Company, the Defendant in the above entitled cause for a plea to the declaration of the Plaintiff, Mary A. Jaquette, executrix of the estate of Isaac G. Jaquette, deceased, heretofore filed *t*herein and to each and every count thereof, says that it is not guilty in the manner and form therein alleged.

R. ROSS PERRY & SON,
G. THOS. DUNLOP,
Attorneys for Defendant.

Joinder of Issue.

Filed January 3, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of the Estate of Isaac G. Jaquette, Deceased, Plaintiff,
vs.
THE CAPITAL TRACTION COMPANY, Defendant.

The plaintiff Mary A. Jaquette, executrix of the estate of Isaac G. Jaquette, deceased, for replication to the plea of the defendant to the amendment to plaintiff's declaration (4th count) joins issue thereon; and thereupon notes issue and trial, standing as in the first instance.

RICHARD P. EVANS,
FRED H. BENSON,
W. W. POULTNEY,
Attorneys for Plaintiff.

Copy served on defendant's attorneys by mail, this 2nd day of January, 1908.

RICHARD P. EVANS,
Of Counsel for Plaintiff.

27 *Memorandum.*

January 28, 1908.—Verdict for Defendant.

Supreme Court of the District of Columbia.

FRIDAY, *March 6th,* 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

No. 49209. At Law.

MARY A. JAQUETTE, Executrix of the Estate of Isaac G. Jaquette, Dec'd, Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

Upon consideration of the motion for a new trial filed herein, it is ordered that said motion be, and the same is hereby overruled, and judgment on verdict is ordered. Thereupon, it is considered and adjudged that the plaintiff herein take nothing by this action,

that the defendant go hereof without day be for nothing held, and recover of plaintiff its costs of defense to be taxed by the Clerk, and have execution thereof.

From the aforegoing the plaintiff by her attorney Mr. Richard P. Evans, in open court, notes an appeal to the Court of Ap-
28 peals, whereupon bond for costs is hereby fixed in the penalty of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars, in lieu of such a bond, in the Registry of this Court.

Memoranda.

March 28, 1908.—January Term, 1908, of Court extended 38 days to settle exceptions and time to submit Bill of Exceptions extended to April 15, 1908.

$50 deposited by appellant in lieu of appeal bond.

April 6, 1908.—Time to submit Bill of Exceptions further extended to May 15, 1908.

May 5, 1908.—Bill of Exceptions submitted to Court.

Time to file record in Court of Appeals extended, from time to time, to February 15th, 1909, inclusive.

29 Supreme Court of the District of Columbia.

MONDAY, *December 14th,* 1908.

Session resumed, pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

By Judge Anderson.

No. 49209. At Law.

MARY A. JAQUETTE, Executrix of Isaac G. Jaquette, Deceased, Plaintiff,

vs.

THE CAPITAL TRACTION COMPANY, Defendant.

The Court having this day signed the Bill of Exceptions heretofore presented herein, now orders the same of record as the time of the noting thereof at the trial.

Bill of Exceptions.

Filed December 14, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of Isaac G. Jaquette, Deceased, Plaintiff,
vs.
THE CAPITAL TRACTION COMPANY, Defendant.

Be it remembered that at the trial of this cause before Mr.
30 Justice Anderson, one of the justices of the Supreme Court of the District of Columbia, and a jury duly impanelled and sworn to try the issue in this cause, the plaintiff, to maintain the issues on her part joined, called as a witness Dr. ALBERT C. PATTERSON, who testified that he was in charge of the records in the Health Department of the District government, and the said records (produced in court) show that Isaac G. Jaquette, white, died in the Emergency Hospital in said District on January 4, 1907, aged 72 years, 10 months and 20 days: cause of death—stumbled against a standing car; fracture of hip and exhaustion; accidental; no inquest.

The plaintiff further called Dr. CHARLES S. WHITE, who testified that he was the superintendent of the Emergency Hospital, December 25, 1906; that said Isaac G. Jaquette was treated in said hospital about ten days and died there; that he had a broken leg and kidney disease: that he died in his judgment of nephritis, or kidney disease, following an injury to his thigh.

On cross-examination witness stated, that he first saw deceased on night of the accident—the 25th or the 26th, in the hospital; the deceased was conscious; and he told witness that the way the accident happened was "that he stumbled over a fender of a car while the car was standing." This statement of the deceased was testified to by the witness as a witness in behalf of defendant, but the question was asked on cross examination, by consent.

Plaintiff further called as a witness CHARLES A. JAQUETTE, who testified that the plaintiff is his mother and is the executrix of
31 the estate of his father Isaac G. Jaquette; deceased was a clerk in the Pension Office; salary $1200; that he was 72 years of age: in pretty good health at time of the accident: was very active: had good vitality: for 6 or 8 or 10 years before the accident his health was generally good: saw him at Emergency Hospital about two hours after the accident; he was suffering great pain; never seemed very clear in his mind; he had a broken leg.

Q. How do you know that he had a broken leg? A. I saw it.

He was suffering with his leg. I am not a doctor, but I saw it was in splinters and had a weight on the end of it.

Mr. PERRY: "Mr. Evans, we make no question that his hip was broken."

Witness further testified that his mother is living but her condition was such that she could not come into court.

Under Cross-examination witness stated that he had been living at home with his father for about two or three years during the past ten years but not immediately before the accident: that his father had required the services of a physician about twice during the five years before the accident.

Plaintiff further called as a witness WILLIAM C. TAYLOR, who testified that he was in charge of the administration records of the Probate Court, and that said records show that Mary A.
32 Jaquette was appointed executrix of the estate of Isaac G. Jaquette on the 25th day of January, 1907.

The plaintiff further called as a witness Dr. WILLIAM TINDALL, who testified that he is the Secretary to the Board of Commissioners of the District of Columbia, and that the records and ordinances of the District are in his custody as the representative of the Commissioners: that the regulations on pages 52 and 53 of the Police Regulations of the District of Columbia, last edition, contain all the ordinances in force on December 25th, 1906, relative to the use of street-car fenders in the District of Columbia, and that it sets forth all the kinds and character of fenders authorized by the Commissioners on the 25th day of December, 1906.

Mr. Evans thereupon read from the Police Regulations as follows (Edition July 24, 1906, pages 52 and 53):

"17. Every motor car operated in the District of Columbia shall be fully equipped with front pick-up fenders of the Blackistone, Claude, Tobe, Preusser or Parmenter pattern, and with wheel-guard fenders of the Brightwood automatic, the Blackistone, the Eldridge Smith, the Tobe, or the Parmenter improved pattern; provided, that any street railway company may substitute for the above any other fender or wheel guard which may hereafter be approved by the Commissioners of the District of Columbia; provided, further, that the details of construction of such fenders and wheel guards be approved by the Engineer Commissioner of the District of Columbia."

33 "19. No motorman or conductor shall operate or have in charge any motor car in the District of Columbia that is not fully equipped with fenders of the kind herein adopted or authorized, and any motorman or conductor operating or being in charge of any such car not so equipped shall, on conviction thereof, be punished by a fine not to exceed ten dollars."

"23. The fenders must be kept in thorough working order and in good repair when in use. Any railway company failing to comply with this provision shall be subject to a fine of twenty dollars a day for each and every offense."

Q. Under what authority did the Commissioners adopt, issue and make these regulations?

Objection to the question by Mr. Perry.

The COURT (after discussion): "I will state in the presence of the jury, and they will receive it as a fact in this case, that this ordinance was adopted pursuant to an Act of Congress of the United States."

Witness, continuing his testimony, stated that quite a number of those regulations were made separately: one fender would be adopted at one time, and one at another: (after examining books) the Parmenter fender was added to the list on February 19, 1897.

Mr. PERRY: Let me see that entry one minute, before you turn it over, Doctor. I would like to read this.

(Mr. Perry thereupon read as follows:)

"That section 18 of Article X of the Police Regulations
34 of the District of Columbia is hereby amended by adding thereto the following:

"Provided, that the Parmenter front fender be added to the list of approved front fenders, on condition that the striking edge be covered by thick rubber hose as a buffer, and that rubber be substituted for the present iron rollers thereon; and that a locking device be provided for holding it down to the tracks when dropped or thrown by the motorman."

The WITNESS: There is an amendment to that—April 3, 1897.

Mr. Perry thereupon read the amendment, as follows:)

"That the order of February 19th, 1897, amending section 18 of Article X of the Police Regulations of the District of Columbia by providing that the Parmenter front fender be added to the list of approved front fenders on certain conditions, is hereby amended by revoking so much of said amendment as prescribes said conditions."

Mr. EVANS:

Q. Can you tell when the Preusser fender was adopted or approved by the Commissioners?

The WITNESS: May 3, 1905.

In connection with this testimony Mr. Evans, thereafter, read in evidence the following paragraph from 28 Stat. L., page 250—Act approved August 8, 1894.

"That the Commissioners of the District of Columbia be and they are hereby authorized and empowered to make and to enforce
35 all reasonable regulations in respect to requiring street-cars, operated by other means than horse power, in the District of Columbia to be provided with proper fenders for the protection of the lives and limbs of all persons within the District of Columbia; such power and authority shall extend to the adoption by the said Commissioners of any fender or fenders deemed by them to be superior to the fender now in use, as the fender or fenders which shall be used on cars operated within the said District. Provided, that nothing contained in this Act shall operate to relieve any street railway company of liability for accidents on its lines."

The plaintiff further called as a witness in her behalf DAVID S. CARLL, who testified as follows; that he is chief engineer and superintendent of the Capital Traction Company; has been such over 12 years; the said Company owns and operates the Fourteenth Street car line; that the Parmenter car fender was used on said line on the 25th day of December 1906, the same fender is used now; and has been since early in 1898; the fender is hung on front of the car, on hangers; they are all interchangeable from one car to another; there is an arrangement so that the motorman can drop the fender; there is a trip, that he can trip with his knee, on the front dash of the car that allows the front of this fender to strike on the ground; when the fender is tripped the front falls to the ground; the place back where it is hung remains stationary fourteen inches
36 from the ground; the hangers normally stand about 14 inches from the ground; the front of the fender stands from 6 to 10 or 12 inches from the ground; the same device was in use on the company's cars on the Fourteenth street line on December 25, 1906.

Question. Now, Mr. Carll, what is the position of the front part of the fender, when it is in perfect condition, is it level and parallel to the pavement or track, or has it got an upward tilt in front?

Objection was made to this question because of the use of words "perfect condition" which objection was sustained by the court; to which ruling of the court the plaintiff then and there excepted.

The witness continuing testified, that when the fender is in a reasonably proper condition it probably tips up in front a little as a rule but it is immaterial; that these fenders extend in front of the car "I should say" something over four feet.

(At this point the fender heretofore referred to was brought into the court-room and set up in position before the jury.)

(By Mr. EVANS:)

Q. Is that particular fender one that has been used, Mr. Carll, or is it a new one? A. I know it has been used. There is not any that has not been.

Q. Is that the ordinary position when the fender is in its usual condition for use on your car? A. Practically so.

Q. And that has been the ordinary condition of the fender
37 in use on the Fourteenth street cars on the 25th day of December 1906? A. Yes, sir.

Q. Will you explain the dropping device and see how far that fender drops? A. (To a juror.) Take that chain off there; slip that chain off.

(At this point a juror removed a chain that held the front of the fender in an elevated position.)

The WITNESS: This end (indicating) would come on the ground if it was on the car.

Q. If that strip of wood was not in the way that fender would drop to the ground, would it? A. This would be right on the ground (indicating).

Mr. PERRY: That is, when it is loosened?

A. Yes sir; when it is tripped.

Q. Now about the operating device. You spoke about touching something with the knee. Will you explain that? A. Yes sir; on the piece of iron that extends there (indicating) there is a little catch that goes on it, that holds it up and that has a bar that runs up on the front of the platform that the motorman can press his knee against, which throws that out and allows the fender to trip.

Q. When the fender is in good working condition is that easily and quickly done? A. Yes sir.

Under cross-examination the witness further testified, that these fenders are known as the Parmenter fender; that they have
38 been in use on all the Capital Traction cars except the Chevy Chase line since 1898; has continued ever since in use; is the same type of fender referred to by the regulations of the District government, passed February 19, 1897; and that no remonstrance to its use has been made by the District government in any way.

The plaintiff further called as a witness D. E. CROUSHORN who testified as follows: that he resides in Harrisonburg, Virginia; was in service of the Capital Traction Company from November 1906 to May 1907; was running car No. 111 which was a Fourteenth Street car as conductor on Fourteenth Street on December 25 1906; Mr. Heflin was motorman; (Here Mr. Evans asked witness where Mr. Heflin was, if he knew, and witness stated he thinks he is in the building he was a few minutes ago. Mr. Perry—"If you want him you can have him.") That he does not remember handling the fender on that car that day; had a fender on both ends of the car; recollects an accident that happened on the corner of Fifteenth and G. streets on that day; that it occurred in connection with his car; that he had seen and himself operated the fenders to drop them in the street; that they respond quickly; it is done by a lever that stands on the platform of the car; the motorman operates it with his knee; it is a cross piece there about 8 or 10 inches long; he presses his knee against it and loosens it in some way, and the fender drops close to the ground; that he has operated the fender out of curiosity, to see how it worked; it operated easily and readily; not upon
39 a mere touch; you have to exert some pressure upon it but not a great amount of pressure.

Does not recollect whether a car was on the east track when his car was on the west track at 15th and G streets at the time of the accident; the Capital Traction Company has a transfer station there; between G street and New York Avenue; transferred passengers at that time to the Georgetown line; the accident took place right there at 15th and G Streets; we knew it as the 15th Street Junction; witness' car was running south; front of car was located, possibly, between the drug store and the corner of G Street; there is a stop plate there.

Under cross-examination the witness testified that at the time of the accident he was on the rear platform of this car.

GRACE W. EVANS, a witness called by and on behalf of the plaintiff, testified as follows; that she is married; is not related to Mr. Evans counsel for plaintiff; was not married on December 25, 1906; name then was Grace De Shields Witter; she was witness to an accident that occurred December 25, 1906, in front of Thompson's drug store, there, at the change for the Georgetown cars from 14th street; it is 15th street; was on her way to church and had gotten off of the 14th street car to transfer to the Georgetown line; was standing right at front of the car at the time of the accident; had just stepped off the car on west side of the street; was standing about on a line with the corner of G street; she was standing where she
40 could observe the approaches to the fender on that car, about two feet from the fender.

Question. Will you just describe in your own way what the accident was that you saw happen at that place? Answer. "I stepped off of the car and was waiting for the car to pass on so that I could cross the track on the other side and take the car enroute for Georgetown. While I was waiting for this car to pass, this 14th street car, I saw a gentleman running down the street hurriedly. That is, after he had left the crossing he ran to the car and motioned to the motorman to hold the car until he could alight—until he could get on the car. Well, the motorman's attention was attracted and he was holding the car, but in the eagerness of the gentleman to get on the car he stumbled and fell. My escort went to his assistance, at my suggestion; and also at my suggestion some other gentleman because he was not really able to be lifted by one gentleman. They started to put him on the car, as he said that was the car he was going to take; but I imagined that he might be suffering, so I also suggested that they take him in Thompson's drug store where it might be necessary to summon an ambulance, so that he might receive proper treatment. My escort helped him to the drug store with the assistance of some other gentleman, and I waited on the corner. He came back to me and then we went on our way to church.

Q. You say he stumbled. What did he stumble over? A. He stumbled over the fender of the car.

Q. Did you notice anything that would indicate that the
41 car was about starting at that time? A. Yes; the starting bell had rung. That is the reason the gentleman tried to attract the attention of the motorman to hold the car for him. He succeeded in attracting attention and the car was waiting.

Q. Just one more question. Did you notice whether or not at the time he stumbled over the fender, the motorman had dropped the fender, or was it stationary? A. No, I did not notice at all, because I am not used to observing those small details.

RICHARD F. PREUSSER a witness called by and on behalf of the plaintiff, testified as follows: I am a locksmith and machinist; have followed that occupation at least forty years; am in business now at 712 Eleventh Street, Northwest; have given attention and study to

the construction and operation of street car fenders; am an inventor myself of a fender, and consequently I studied that for over twelve years; I took out eight patents on fenders.

Question. Do you recollect when you took out the first patent?

Mr. PERRY: One moment. I object to this as entirely immaterial. I suppose this gentleman is the inventor of the Preusser fender; but whether he is or not it is immaterial.

The COURT: He said that he has studied the subject for a dozen years; that he has taken out eight patents on his inventions. It does not make any difference when he took them out, unless you want to show that his study has been of recent years, and that he has invented a patent within recent years, some general statement
42 of that kind I think would probably not be objectionable.

Mr. PERRY: * * * * If he is offered as a witness to impeach in any way the Parmenter fender, I object to it as entirely immaterial.

Mr. EVANS:

Q. What is the date of the last patent you took out?

Mr. PERRY: I object to it as immaterial.

Mr. EVANS: The point is right here, that under the declaration in this case the Company is charged with having, and using, and operating an improper fender, an inadequate fender, an unfit fender, and under the order of the District Commissioners they authorize this Company to adopt five different fenders. As was testified one of those fenders was the Preusser fender. Now the question arises, and it is one that I shall urge, as to whether the Company has adopted the fender that was intended by the Act of Congress, to preserve the lives and limbs of the people in the District of Columbia. As your honor will recollect, it was testified by Dr. Tindall that the Parmenter fender was authorized in 1897; that the Preusser fender was adopted in 1905, and your Honor can readily see the inference that might be argued from that.

* * * * * * *

The COURT: If you want to get it into the record, to state your reasons, so as to save an exception, very well. * * * * Now put your question and I will pass upon it.

(The stenographer read the pending question as follows.)

Q. What is the date of the last patent you took out?

Mr. PERRY: That I object to as irrelevant.

The COURT: If it is merely introductory to something that
43 is relevant; of course I would not heed the objection; but what is it you expect to show? It is introductory to what?

Mr. EVANS: It is introductory to this, if your Honor please. That the patent which was issued to this inventor was adopted by the District Commissioners ten years nearly, or eight years later, at least, than the appliance that was approved and which is now being used by the Capital Traction Company.

The COURT: * * * * What bearing has the character of this fender upon the case—in the light of the testimony.

Mr. EVANS: It has this bearing in the light of the testimony, to my mind; to prove by this witness that this fender, which was authorized and adopted by the District Commissioners, was one that by its operation could have avoided this accident or any similar accident.

The COURT: The objection is sustained.

(Exception.) To which ruling of the court the plaintiff, by her counsel, then and there excepted, and the exception was noted by the justice presiding on his minutes.

Question. Mr. Preusser, what is the difference in the operation of the fender which the District Commissioners adopted and authorized known as the Preusser fender, in dropping and withdrawing in case of coming in contact with any object or person, as distinguished from the same appliance on the Parmenter fender?

Mr. PERRY: That is objected to for a great many reasons.

44 The COURT: The objection is sustained.

(Exception.) To which ruling of the court the plaintiff, by her counsel, then and there excepted, and the exception was noted by the presiding justice on his minutes.

Question. Mr. Preusser, in the operation of your fender, does it drop to the ground or is there any method or appliance by which it draws back out of the way, and as well affords a cushion for the reception of any object that might fall into it?

Mr. PERRY: That is objected to as incompetent and irrelevant.

The COURT: The objection is sustained.

(Exception.) To which ruling of the court the plaintiff by her counsel, then and there excepted, and the exception was noted by the presiding justice on his minutes.

Mr. EVANS: Now, if your Honor please, I offer Mr. Preusser as an expert on the construction and operation of fenders; and as an expert I wish to introduce his testimony as to the relative merits of the two fenders which have been referred to, the Parmenter fender, and the Preusser fender, which have both been approved by the Commissioners of the District of Columbia for use on the street cars in the District.

Mr. PERRY: I object to that as irrelevant and incompetent.

The COURT: The objection is sustained

(Exception.) To which ruling of the court the plaintiff, by her counsel, then and there excepted, and the exception was noted by the presiding justice on his minutes.

45 The counsel for plaintiff then announced his testimony closed; and counsel for the defendant moved the court, upon the evidence adduced, to instruct the jury to render a verdict in favor of the defendant, on the ground that there was no proof whatever of negligence on the part of the defendant; to which motion the plaintiff, by her counsel, objected, but the court overruled said objection and granted said motion, and thereupon instructed the

jury to return a verdict for the defendant: to which ruling and instruction the plaintiff, by her counsel, then and there excepted, and the exception was then and there noted by the justice presiding on his minutes; and the jury in accordance with the instruction of the court returned a verdict for the defendant: and the plaintiff, by her counsel, presents to the court this her bill of exceptions, and prays that the same may be signed and sealed and made a part of the record, and it is accordingly done, now for then, this 14th day of December 1908.

THOS. H. ANDERSON, *Justice.*

Ruling of the Court.

The COURT: "The evidence in this case is wholly inadequate to sustain the contention that the deceased was a passenger upon the defendant's car. On the contrary, it clearly shows that he was not a passenger, although he was at the moment he was injured
46 seeking to become a passenger. That is all I care to say about that.

There is no evidence here showing or tending to show that the defendant company was charged with any duty at the moment which it omitted to perform.

There is nothing here to show that the Company did anything in the placing of this particular fender upon that particular car and at that particular point where it was found, that it had no right to do. On the contrary it was the duty of the Company to have a fender upon that car, and to have it where this fender was, in front of the car. The fender was up at the moment of the accident where it ought to have been except in case of an emergency, because it is simply for use in case of emergency. The deceased in attempting to pass around the car, tripped on that fender.

Now, the only evidence here about this accident is the testimony of Mrs. Evans, and she says that he indicated to the motorman that he wanted to get on that car, that he wanted it to stop. The car was stopped; it had not moved, and he simply held his car. There was no duty cast upon the defendant to drop the fender. If he had dropped it and this man had been injured as the result of it, the probabilities are that the Company would have been charged with negligence in dropping the fender at that particular moment, and thereby injuring the deceased. But he simply allowed his car to stand still, and as Mrs. Evans puts it, in his eagerness to get upon the car he tripped upon the fender. Evidently the man was excited and was hurrying to get around so as to get on, and unfortunately tripped.

So there is absolutely nothing in this case tending to prove
47 any negligence upon the part of the Company. It was a most unfortunate accident. It cost the poor man his life, and deprived the family of its head. Those are things that appeal to our sympathy, but the law cannot simply adjust itself to our sympathy. The law is certain and exact, and must be applied in that way; and it would be a flagrant violation of every rule of law to allow this jury to return a verdict here except by direction of the

Court, in view of the testimony in this case. You will therefore take a verdict for the defendant."

Service of copy of plaintiff's Bill of Exceptions in case of Mary A. Jaquette, Executrix *vs.* Capital Traction Company, Law No. 49,209, acknowledged this 24th day of April, 1908.

R. ROSS PERRY & SON,
Att'ys for Def't.

Directions to Clerk for Preparation of Transcript of Record.

Filed January 18, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49209.

MARY A. JAQUETTE, Executrix of Isaac G. Jaquette, Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

The clerk of the Supreme Court of the District of Columbia
48 will please prepare the transcript of record on appeal, by plaintiff, to the Court of Appeals of the District of Columbia; such transcript to consist of the following papers and proceedings of record in said cause:

Plaintiff's declaration filed February 21, 1907 and amended declaration (4th count) filed December 4, 1907.

Defendant's pleas to the above.

Plaintiff's joinders of issue.

Judgment of the court on verdict.

Bill of Exceptions, and the opinion of the court therewith.

Memoranda of appeal, deposit in lieu of bond for costs, and of extensions of time for filing transcript of record.

RICHARD P. EVANS,
Attorney for Plaintiff.

49 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 48 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49209 At Law, wherein Mary A. Jaquette, Executrix, &c. is Plaintiff and Capital Traction Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of February, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1992. Mary A. Jaquette, executrix, &c., appellant, *vs.* Capital Traction Co., &c. Court of Appeals, District of Columbia. Filed Feb. 15, 1909. Henry W. Hodges, clerk.

COURT OF APPEALS.
DISTRICT OF COLUMBIA
FILED
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Henry W. Hodges, Clerk.

IN THE

Court of Appeals, District of Columbia.

October Term, 1909.

Mary A. Jaquette, Executrix of the Estate of Isaac G. Jaquette, Deceased, *Appellant,* **v. Capital Traction Company, a Corporation.**	**No. 1992.**

Appellant's Brief.

RICHARD P. EVANS,
Attorney for Appellant.

Court of Appeals, District of Columbia.

October Term, 1909.

MARY A. JAQUETTE, Executrix of the estate of ISAAC G. JAQUETTE, deceased, Appellant,
v.
CAPITAL TRACTION COMPANY, a Corporation.

No. 1992.

APPELLANT'S BRIEF.

The Case.

The appellant, executrix and widow of Isaac G. Jaquette, deceased, sued the appellee, Capital Traction Company, for damages for the death of said deceased resulting from an accident which happened on the 25th day of December, 1906, at the corner of Fifteenth and G streets northwest, in this city, while the deceased was a passenger of the appellee railroad.

The facts, as developed at the trial, are substantially as follows:

The deceased was a man 72 years of age, and was employed as a clerk in the Pension Office at the annual salary of $1,200. At the time of the accident he was in pretty good health (Rec., p. 17), was very active, and had good vitality.

On December 25, 1906, at about 12.30 o'clock P. M., the deceased attempted to get aboard car No. 111 of appellee's Fourteenth street line, which was standing at the transfer station at the corner of Fifteenth and G

streets northwest, opposite the northeast corner of the Treasury building. The car was on the north side of G street and was on the west track, south bound towards Pennsylvania avenue, and was heading on the line of G street.

The deceased approached the car from the east side of Fifteenth street, at the northeast corner of G street. *The starting bell had rung, but the deceased motioned to the motorman to hold the car for him and attracted his attention* (Rec., p. 22), *and the motorman held the car for him*, but in hurrying to get on the car the deceased stumbled over the front fender of the car and was thrown down and had his hip broken (admitted Rec., p. 18). Several gentlemen went to his assistance and "*they started to put him on the car, as he said that was the car he was going to take*" (Rec., p. 22), but at the suggestion of a witness they took him to Thompson's drug store. From there he was taken to the Emergency Hospital, where he died on January 4, 1907, from "fracture of hip and exhaustion" (Rec., p. 17).

The testimony of David S. Carll, superintendent of the appellee company, shows that the fender in use on that car at the time of the accident was a "Parmenter" car fender which are all interchangeable (Rec., p. 20); that the front of the fender stands from 6 to 8 or 12 inches from the ground, with an upward tilt in front; that the fender extends in front of the car something over four feet; that the motorman can press a "trip" with his knee and drop the fender to the ground; that when the fender is in good working condition this is easily and quickly done (Rec., p. 21). In connection with his testimony the Parmenter fender was brought into the court-room and exhibited.

The conductor on the car testified (Rec., p. 21) that he had no recollection of handling the fender on that car

that day; *had a fender on both ends of the car;* that he had seen and had himself operated the fenders to drop them in the street; that they respond quickly; it is done by a lever that stands on the platform of the car; *the motorman* presses his knee against it and loosens it in some way and the *fender drops close to the ground;* that he had operated the fender out of curiosity to see how it worked, and it operated easily and readily.

The record shows (Rec., p. 18) that at the date of the accident to the deceased, December 25, 1906, the following ordinance of the Commissioners of the District of Columbia was in force as a Police Regulation:

"17. Every motor car operated in the District of Columbia shall be fully equipped with front pick-up fenders of the Blackistone, Claude, Tobe, *Preusser* or *Parmenter* pattern, and with wheel-guard fenders of the Brightwood automatic, the Blackistone, the Eldridge Smith, the Tobe, or the Parmenter improved pattern, provided, that any street railway company may substitute for the above any other fender or wheel-guard which may hereafter be approved by the Commissioners of the District of Columbia; provided, further, that the details of construction of such fenders and wheel-guards be approved by the Engineer Commissioner of the District of Columbia."

And that this ordinance was adopted under the authority of an Act of Congress of August 8, 1894, as follows (Rec., p. 19):

"35. That the Commissioners of the District of Columbia be and they are hereby authorized and empowered to make and to enforce all reasonable regulations in respect to requiring street-cars, operated by other means than horse power, in the District of Columbia to be provided with proper fenders for the protection of the lives and limbs of all persons within the District of Columbia; such power and authority shall extend to the adoption by the said Commissioners of any fender or fenders deemed by them to be superior to the fender now in use, as the fender or

fenders which shall be used on cars operated within the said District. *Provided that nothing contained in this Act shall operate to relieve any street railway company of liability for accidents on its lines.*"

The testimony of Dr. William Tindall, Secretary to the Board of Commissioners, further shows (Rec., p. 19) that "one fender would be adopted at one time and one at another," and that the PARMENTER fender was added to the list on *February 19, 1897*, by the following ordinance (Rec., p. 19):

"That section 18 of Article X of the Police Regulations of the District of Columbia is hereby amended by adding thereto the following:

"Provided, that the Parmenter front fender be added to the list of approved front fenders, *on condition that the striking edge be covered by thick rubber hose as a buffer, and that rubber be substituted for the present iron rollers thereon; and that a locking device be provided for holding it down to the tracks when dropped or thrown by the motorman.*"

And this witness further testified that this order was amended on April 3, 1897, as follows (Rec., p. 19):

"That the order of February 19th, 1897, amending section 18 of Article X of the Police Regulations of the District of Columbia by providing that the Parmenter front fender be added to the list of approved front fenders *on certain conditions*, is hereby amended by *revoking so much of said amendment as prescribes said conditions.*"

(Thus rescinding the safety clause of the original ordinance.)

The witness further testified that the PREUSSER fender was adopted or approved by the Commissioners on *May 3, 1905* (Rec., p. 19) (over *eight years* subsequent to the approval of the Parmenter fender, and over a year and a half preceding the date of the accident to the deceased, caused by use of the Parmenter fender).

Richard F. Preusser, the inventor of the PREUSSER fender, then testified as follows, as the record stands (Rec., p. 22 *et seq.*) :

"I am a locksmith and machinist; have followed that occupation at least forty years; am in business now at 712 Eleventh street Northwest; have given attention and study to the construction and operation of street-car fenders; am an inventor myself of a fender, and consequently I studied that for over twelve years; I took out eight patents on fenders."

Further testimony from this witness was excluded upon the objection of counsel for the appellee, the questions, objections, rulings and exceptions taken being as follows (Rec., pp. 23–24) :

Question. Do you recollect when you took out the first patent?

Mr. Perry: One moment. I object to this as entirely immaterial. I suppose this gentleman is the inventor of the Preusser fender: but whether he is or not it is immaterial.

The Court: He said that he has studied the subject for a dozen years; that he has taken out eight patents on his inventions. It does not make any difference when he took them out, unless you want to show that his study has been of recent years, and that he has invented a patent within recent years, some general statement of that kind I think would probably not be objectionable.

Mr. Perry: * * * If he is offered as a witness to impeach in any way the Parmenter fender, I object to it as entirely immaterial.

Mr. Evans:

Q. What is the date of the last patent you took out?

Mr. Perry: I object to it as immaterial.

Mr. Evans: The point is right here, that under the declaration in this case the Company is charged with having, and using, and operating an improper fender, an inadequate fender, an unfit fender, and under the order of the District Commissioners they authorize this

Company to adopt five different fenders. As was testified one of those fenders was the Preusser fender. Now the question arises, and it is one that I shall urge, as to whether the Company has adopted the fender that was intended by the Act of Congress, to preserve the lives and limbs of the people in the District of Columbia. As your Honor will recollect, it was testified by Dr. Tindall that the Parmenter fender was authorized in 1897; that the Preusser fender was adopted in 1905, and your Honor can readily see the inference that might be argued from that.

* * * * * * *

The Court: If you want to get it into the record, to state your reasons, so as to save an exception, very well * * * Now put your question and I will pass upon it.

(The stenographer read the pending question as follows.)

Q. What is the date of the last patent you took out?

Mr. Perry: That I object to as irrelevant.

The Court: If it is merely introductory to something that is relevant, of course I would not heed the objection; but what is it you expect to show? It is introductory to what?

Mr. Evans: It is introductory to this, if your Honor please. *That the patent which was issued to this inventor was adopted by the District Commissioners ten years nearly, or eight years later, at least, than the appliance that was approved and which is now being used by the Capital Traction Company.*

The Court: * * * What bearing has the character of this fender upon the case—in the light of the testimony?

Mr. Evans: It has this bearing in the light of the testimony, to my mind; to prove by this witness that this fender, which was authorized and adopted by the District Commissioners, was one that by its operation could have avoided this accident or any similar accident.

The Court: The objection is sustained.

(Exception.) To which ruling of the court the plaintiff, by her counsel, excepted.

Question. Mr. Preusser, what is the difference in the operation of the fender which the District Commissioners

adopted and authorized, known as the Preusser fender, in dropping and withdrawing in case of coming in contact with any object or person, as distinguished from the same appliance on the Parmenter fender ?

Mr. Perry: That is objected to for a great many reasons.

The Court: The objection is sustained.

(Exception.) To which ruling of the court the plaintiff, by her counsel, excepted.

Question. Mr. Preusser, in the operation of your fender, does it drop to the ground or is there any method or appliance by which it draws back out of the way, and as well affords a cushion for the reception of any object that might fall into it ?

Mr. Perry: That is objected to as incompetent and irrelevant.

The Court: The objection is sustained.

(Exception.) To which ruling of the court the plaintiff, by her counsel, excepted.

Mr. Evans: Now, if your Honor please, I offer Mr. Preusser as an expert on the construction and operation of fenders; and as an expert I wish to introduce his testimony as to the relative merits of the two fenders which have been referred to, the Parmenter fender, and the Preusser fender, which have both been approved by the Commissioners of the District of Columbia for use on the street cars in the District.

Mr. Perry: I object to that as irrelevant and incompetent.

The Court: The objection is sustained.

(Exception.) To which ruling of the court the plaintiff, by her counsel, excepted.

This closed the testimony on behalf of the appellant, and counsel for the defendant moved the court to instruct the jury to render a verdict in favor of the defendant, on the ground that there was no proof whatever of negligence on the part of the defendant; to which motion the plaintiff, by her counsel, objected, but the court overruled said objection and granted said motion, and thereupon instructed the jury to return a verdict for the defendant

(Rec., p. 25), to which ruling and instruction the plaintiff, by her counsel, then and there excepted; and the jury in accordance with the instruction of the court returned a verdict for the defendant.

Motion for a new trial was overruled and judgment entered upon the verdict (Rec., p. 15); from which judgment this appeal is taken to this court.

Assignment of Errors.

1. The court erred in instructing the jury to return its verdict in favor of the defendant.

2. The court erred in ruling that the evidence was wholly inadequate to sustain the contention that the deceased was a passenger on defendant's car.

3. The court erred in ruling that there was no evidence tending to show that the defendant company was charged with any duty which it omitted to perform.

4. The court erred in ruling that there was absolutely nothing in the case tending to prove any negligence upon part of the defendant.

5. The court erred in excluding the testimony of the plaintiff's witness, Richard F. Preusser.

(NOTE.—The appellant here was plaintiff below.)

Argument.

The following questions properly arise upon the assignment of errors:

1st. Does not the proof tend to show, as matter of law and fact, that the deceased was a passenger upon the defendant's car, and was not the plaintiff entitled to submission of the case to the jury upon that question?

2d. Does not the proof sufficiently show for submission of question to the jury, that the defendant company failed in its duty to the deceased by placing and main-

taining a dangerous obstruction in his pathway, and then neglecting to do what it might have done to prevent the accident?

3d. Is not the doctrine of *res ipsa loquitur* applicable?

4th. Was not the testimony of the plaintiff's witness, PREUSSER, competent either as a lay or expert witness, and was it not relevant and material to the plaintiff's case?

1. As to the First Proposition.

The testimony conclusively shows (Rec., p. 21) that the defendant's (appellee) car No. 111 was standing at its transfer station on Fifteenth street between G street and New York avenue northwest, known as the Fifteenth street Junction; that the car was on the west track running south; that the starting bell had rung (Rec., p. 22) but the deceased motioned to the motorman to hold the car until he could get on, and the motorman's attention was attracted and he held the car; the deceased was injured in attempting to get on that car; and (after he was injured) "they started to put him on the car, as he said that was the car he was going to take."

Now, under these conditions, was the deceased, as a matter of law, a passenger, a mere traveler crossing the highway, or a trespasser on the company's track?

Clearly, he was not a trespasser, for he had the unquestioned right to cross the defendant's tracks and to be where he was.

Surely, he was not a mere traveler on the highway, for his manifest intention and expressed purpose was to approach and get on the company's car. He hailed the car, the motorman recognized him and held the car for him *after the starting bell rang*, and he attempted to get on the standing car; and he stated "that was the car he was going to take."

Consequently, how can the conclusion be avoided that, as a matter of law, the deceased was a passenger?

In Hutchinson on Carriers (3 Ed., 1906), Sec. 1005, the rule is stated:

"But a person may become a passenger, without having entered into the carrier's vehicle, if the surrounding circumstances show an intent upon his part to become a passenger, and an acceptance of him by the carrier as a passenger. * * * If one has given a proper signal, and the train is stopped for the purpose of taking him aboard, he is when attempting to board the train a passenger, and entitled to all the rights due a passenger though he has purchased no ticket."

In North Chicago Street Railway *v.* Williams the court held (140 Ill., 275):

"It is not necessary that there be an express contract in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract. The contract may be implied from slight circumstances, and it need not be actually consummated by the payment of fare or entry into the car or boat of the carrier. The whole matter seems to depend upon the *intention of the person* at the time."

Bryan *v.* Bennett, 8 Carrington & Payne, 724.
Norfolk & Richmond Ry. Co. *v.* Gallagher, 89 Va., 639.
Alexander *v.* C. R. I. & P. Ry. Co., 37 Iowa, 264.
Brown *v.* W. & G. R. R. Co., 11 App. D. C., 37.
Warner *v.* B. & O. R. R. Co., 168 U. S., 339, *and authorities there cited.*

"The question whether one is a passenger or not is one of mixed law and fact; but the law being tolerably clear it may be said, as a general rule, that the issue upon any conflict of evidence is one for the jury to decide, and not one to be passed upon as a matter of law by the court."

Ency. of Law & Proc., Vol. 5, p. 486.

The case of Warner *v.* B. & O. Railroad Co., 168 U. S., 339, is in some respects analogous to the case at bar.

The deceased, Collins, was killed while crossing one of the defendant's tracks, at a station, *presumably* to take a train standing on another track. But there was not the clear and apparent offer and expressed intention to become a passenger, and the equally positive invitation and acceptance as a passenger, as shown by the testimony in this case.

The Supreme Court in its opinion in that case states, in part:

"To concede the rule, and, in a given case, to take a passenger beyond its protection by holding that one who goes in proper time to a station for the purpose of taking a train over the road, and has a ticket for travel thereon, is not to be considered to be a passenger *until he has manifested by some outward act his intention to board a train and become a passenger*, is to admit the rule on the one hand and on the other to deny it. It is also clear that to say that one who goes to a station to take a train must exercise the same circumspection and care as a traveler on the highway or a trespasser, *unless by some implication* the corporation has *invited* the person to *deport himself as a passenger*, and that such implication must be determined as matter of law by the court and not of fact by the jury, is, in effect, under the form of a qualification, to destroy the rule."

In the case at bar the deceased was at the defendant's "transfer station" and *did manifest by an outward act his intention to board the car and become a passenger*, and the defendant corporation *did by implication invite him to deport himself as a passenger;* and the court below ruled on this testimony as follows (Rec., p. 25):

The court: "The evidence in this case is wholly inadequate to sustain the contention that the deceased was a passenger upon the defendant's car. On the contrary

it clearly shows that he was not a passenger, *although he was at the moment he was injured seeking to become a passenger.* * * * Now, the *only evidence* here about this accident is the testimony of Mrs. Evans, and she says that he (deceased) *indicated to the motorman that he wanted to get on that car*, that he wanted it to stop. The car was stopped; it had not moved, and he (motorman) *simply held his car.* * * * But he (motorman) simply *allowed his car to stand still*, and as Mrs. Evans puts it, in his (deceased) eagerness *to get upon the car* he tripped upon the fender. Evidently the man was excited *and was hurrying around so as to get on* and unfortunately tripped."

It should also be noticed that the witness (Mrs. Evans) further testifies (Rec., p. 22):

"Yes; the *starting bell had rung.* That is the reason the gentleman tried to attract the attention of the motorman to *hold the car* for him. He *succeeded* in *attracting attention* and *the car was waiting.*"

This witness also testifies that after the accident "They started to put him on the car as *he said that was the car he was going to take.*"

It appears clear, therefore, that the testimony and the ruling of the court thereon brings the case at bar clearly within the reasoning and conclusions of the Supreme Court in the *Warner* case, above cited.

In the case of Bryan *v.* Bennett, 8 Carrington & Payne, *supra*, the person injured *held up his finger*, the *driver stopped* to take him up, and the plaintiff was putting his foot on the step of the omnibus when it started and the plaintiff fell and was injured. Lord Abinger, in pronouncing the opinion of the court, said *that the stopping of the omnibus consented to take the person as a passenger;* and it was held to be evidence of that fact *for the jury.*

This, apparently, is the earliest announcement of this

doctrine, which has since become generally recognized and established.

The conclusion appears inevitable that the court erred in its ruling upon this question in the case at bar, and that the deceased was, constructively, a passenger upon the defendant's car.

Upon this assumption, the deceased being shown to have been injured while attempting to board the defendant's car, by tripping over an obstruction placed and maintained in his path by the defendant, the burden of proof shifts, and it is submitted that the defendant company should have been put upon its defense before the jury.

II. As to the Second Proposition.

The court in its ruling held (Rec., p. 25):

"There is no evidence here showing or tending to show that the defendent company was charged with any duty at the moment which it omitted to perform."

Had the court not have excluded the testimony of the witness Richard F. Preusser, the evidence on this proposition would have been superabundant; but, as the record stands, there is sufficient proof in the case to put the defendant company to its defense, whether plaintiff's deceased is regarded as a passenger, or as a pedestrian entitled to be safeguarded by the defendant company in the use and operation of its appliances on the city streets.

Is it not true that the defendant company was, *at the moment*, charged with the duty of protecting—or endeavoring to protect—its intending passengers, and the traveling public, from the danger to life and limb occasioned by its own obstructions placed and maintained in the approaches to its cars, in the public streets?

Did the defendant company perform that duty towards the deceased?

The evidence on these points is clear and demonstrative.

The witness David S. Carll, chief engineer and superintendent of the defendant company, testified (Rec., pp. 20, 21) that the Parmenter car fender was in present use on the defendant's Fourteenth street line and had been in use since early in 1898; that the fender is hung on front of the car, on hangers; *they are all interchangeable from one car to another;* there is an arrangement so that the motorman can drop the fender; there is a trip, that he can trip with his knee, on the front dash of the car that allows the front of this fender to strike on the ground; *when the fender is tripped the front falls to the ground;* the place back where it is hung remains stationary fourteen inches from the ground; the hangers normally stand about fourteen inches from the ground; the front of the fender stands *from six to ten or twelve inches from the ground;* the same device was in use on the company's cars on the Fourteenth street line on December 25, 1906; * * * that when the fender is in a reasonably proper condition it probably tips up in front a little as a rule, but it is immaterial; that *these fenders extend in front of the car something over four feet;* that when the fender is in good working order (Rec., p. 21) it is *easily and quickly* tripped. And the witness demonstrated in open court, with a practical fender, how this could be done (Rec., p. 20).

D. E. Cronshorn, the conductor on defendant's car at time of the accident, testified (Rec., p. 21):

"That he does not remember handling the fender on that car on that day; *had a fender on both ends of the car;* recollects an accident that happened on the corner of Fifteenth and G streets on that day; that it occurred in connection with his car; that he had seen and himself operated the fenders to drop them in the street; *that they respond quickly;*

it is done by a lever that stands on the platform of the car; the motorman operates it with his knee; it is a cross piece there about 8 or 10 inches long; he presses his knee against it and loosens it in some way, and the fender drops close to the ground; that he has operated the fender out of curiosity to see how it worked; it operated easily and readily; not upon a mere touch; you have to exert some pressure upon it but not a great amount of pressure."

The evidence upon the happening of the accident (Rec., p. 22) shows that the deceased signaled the car, attracted the attention of the motorman, who saw him and held the car for him *after the starting bell had rung*, and that the motorman was holding the car for him to get on at the time the deceased was tripped and thrown by the fender. The defendant's motorman, therefore, saw the old gentleman approaching that fender—"extending something over four feet in front of the car," with its front elevated "six, ten or twelve inches from the ground" and with a little tip up in front—and saw his danger.

But did the defendant's motorman do anything, or attempt to do anything, at the moment, toward preventing the accident and protecting the deceased from the danger caused by the defendant company's own operation of its own appliances, by it placed and maintained as an obstruction in the public pathway?

Nothing—absolutely nothing—is shown.

Not even a warning shout is heard!

Not even is the endeavor made to save the deceased from the impending danger by "tripping" that fender and dropping it to the ground out of his way.

It is true that the court ruled (Rec., p. 25) that the fender was "*at the moment of the accident* where it ought to have been *except in case of an emergency* because it was simply *for use in case of emergency*," and that "there was no duty cast upon the defendant to drop the fender."

But are not these questions of *fact* which should have been submitted to the jury?

Whether this was a "case of an emergency" (when a man's life was in peril), if at all a competent and material question, was surely one of fact for the jury and not of law for the court.

Was the defendant's fender at the moment of the accident in the position where it ought to have been?

Was there anything the defendant company could have done with that fender, at the moment, which might have averted the impending accident, and if so, was its failure to do negligence upon its part?

A working fender was exhibited before the jury and its practical operation shown (Rec., p. 20) especially for its information on these very points; and surely these were questions of fact for the jury and not of law for the court.

This proposition might well be concluded at this point; but we will ask consideration of the question whether there was not a duty owing to the deceased, and to the public generally, by the defendant company, antedating the accident, which not having been performed charges the defendant with negligence in the happening of this accident.

The testimony of defendant's chief engineer and general manager, David S. Carll, shows that (Rec., p. 20) these fenders used by the defendant company "*are all interchangeable from one car to another*"; and the testimony of its conductor, D. E. Cronshorn (Rec., p. 21), that his car "had a fender on both ends of the car."

Now it is a matter of common and general observation and knowledge that where these cars have a fender at *both ends* the fender at the back of the car is kept *hooked up to the dashboard out of people's pathway.* The defendant company recognizes its duty to safeguard the public and its passengers in this operation of its fender—which

is *interchangeable*—when on the rear end of its cars. Then why are they not charged with the same duty at its crowded transfer stations and junctions, where their cars stand side to side, their front fenders extending "something over four feet" in both directions, a constant obstruction, menace and danger to its transferring passengers and pedestrians. Had the fender on the front of that car been hooked up to the front dashboard while the car was standing at its transfer station and junction at the intersection of New York avenue and Fifteenth and G streets, instead of being extended "something over four feet" in front of the defendant's car (and in the pathway of the deceased) the accident and fatal injury to the deceased could not have happened.

The failure of the defendant company to so use and operate its said fender constituted a lack of that degree of care and caution which it is bound to exercise for the protection of its passengers and the public in running its cars.

Barstow *v.* Capital Traction Co., 29 App. D. C., 362.

Capital Traction Co. *v.* Lusby, 12 App. D. C., 300.

Metropolitan R. R. Co. *v.* Falvey, 5 App. D. C., 176.

Georgetown & T. R. R. Co. *v.* Smith, 29 App. D. C., 261.

Capital Traction Co. *v.* Brown, 29 App., 473.

Fitts *v.* Cream City Ry. Co., 59 Wis., 323.

Warner *v.* B. & O. R. R. Co., 168 U. S., 339.

Inland and Seaboard Coasting Co. *v.* Tolson, 139 U. S., 558.

Grand Trunk Ry. Co. *v.* Ives, 144 U. S., 409.

Met. Ry. Co. *v.* Suashall, 3 App. D. C., 420.

Blick *v.* Met. Ry. Co., 22 App. D. C., 194.

It may be suggested that the record does not show how the defendant company operates and carries its fenders when attached to the rear of its cars. But this is a matter of common observation and knowledge; and Mr. Justice Field, sitting as Circuit Judge, said in the case of Ho Ah Kow *v.* Nunan, 5 Sawy., 560; 12 Fed. Cases, 252:

"Besides, we can not shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know as judges what we see as men."

In conclusion of this proposition we will cite the language of this court in the following cases: In Koontz *v.* Dist. of Col. *et al.*, 24 App. D. C., 59, the court says:

"Whatever the court may have thought of the weight of the evidence produced by the plaintiff, there was certainly some evidence bearing upon the questions involved (as to all the defendants) which would have justified a rational conclusion as to their liability. And this being the case the evidence should have been considered by the jury. (Whether there was contributory negligence on the part of the plaintiff in producing the injury complained of was not a question of law for the court, but one of fact for the jury, to be determined upon consideration of the whole evidence before them.)"

In the case of Capital Traction Co. *v.* Brown, 29 App. D. C., 473, this court remarks:

"The trend of judicial decisions is towards the more practical and humane rule that street railway companies must be held responsible for conditions which they themselves create."

And, finally, in the case of Blick *v.* Metropolitan Ry. Co., 22 App. D. C., 194, the court holds as follows:

"There might have been mistakes or miscalculation or inattention on the part of the plaintiff, but certainly there

was no such clear case of negligence as that all sensible men would take but one view of it. * * * Nor was there such failure of proof that the defendant was negligent as would justify the withdrawal of the case from the jury. Both the plaintiff and the defendant were entitled to be on the street. * * * If the plaintiff was too dangerously near the track the motorman of the car must have been aware of the fact. Then the motorman knew, or should have known, that the rear end of his car projected several feet beyond the track in going around the curve, and that, therefore, there was danger from it to passing vehicles. Intelligent men might well have been divided in opinion as to the duty of the motorman in the premises, and if this be admitted, as we think it must be, it is plain that a case arises for the jury and not for the court."

Georgetown & T. Ry. Co. *v.* Smith, 25 App. D. C., 261.

Kennedy *v.* St. Paul City Ry. Co., 59 Minn., 45.

Lang *v.* Houston Ry. Co., 75 Hun. (N. Y.), 151.

McLain *v.* Brooklyn City Ry. Co., 116 N. Y., 459.

III. As to the Third Proposition.

The doctrine of *res ipsa loquitur* appears clearly to apply to this case.

That the fender, as fixed and operated, was dangerous to passengers and pedestrians, the occurrence of the accident demonstrates.

No explanation of the accident was offered at the trial by the defendant company—further than that of the plaintiff's witness, Dr. Charles S. White (Rec., p. 17), who on cross-examination was made a witness for the defendant, by defendant's counsel, and as such testified—"The deceased was conscious and he told witness that the way the accident happened was '*that he stumbled over a fender of a car while the car was standing.*'"

But relying upon the plaintiff's case the defendant

made no explanation or defense of its use and operation of its appliance that caused the fatal injury to the deceased. The plaintiff's case must therefore be taken as true.

The case presented by the plaintiff, as set forth in the preceding pages, shows the use and operation by the defendant company of an appliance called a fender, extending "something over (?) four feet" in front of the defendant's car and elevated some "6 or 10 or 12 inches (?) from the ground" with a "tip up" in front; that this obstruction (*per se* a dangerous snare and trap for the feet of the pedestrian) was placed and operated by the defendant company at a transfer station in the pathway of the deceased and the traveling public; that the plaintiff's deceased offered himself as a passenger and was accepted and invited to get on the defendant's car; that on his way to enter the car he was tripped up and injured by the obstacle placed, maintained and operated in his course of travel by the defendant company; and that by the exercise of care and prudence the defendant company might have so operated the said appliance, and obstruction and danger to travel, as to have prevented the accident.

The language of this court in the *Blick* case (last above quoted), and in the case of Georgetown and T. Ry. Co. *v.* Smith, 25 App. D. C., with a mere alteration in the nouns, appears to aptly apply to the facts of the appellant's case, herein. In the last cited case this court says:

"The whole question seems to come to the jury to determine whether or not, under the form of the car (fender) that was used here, with the width of the track (fender) that was used here, with the style of open car (fender) built as it was, and with rail (fender) in position it was, there was anything this company ought to have done, as a prudent and reasonable person to prevent the happening of an accident of this kind. * * * If the defendant's servants saw him in a position of apparent danger, it was

their duty (notwithstanding his negligence) to do all they could to prevent the accident, and if they failed to do so the defendant was liable."

Inland & Seaboard Co. *v.* Tolson, 139 U. S., 558.
Grand Trunk R. R. Co. *v.* Ives, 144 U. S., 409.
W. & G. R. R. Co. *v* Hickey, 5 App. D. C., 436; 166 U. S., 521.
Barstow *v.* Cap. Tr. Co., 29 App. D. C., 362.
Fitts *v.* Cream City R. R. Co., 59 Wis., 323.
Hawley *v.* Columbia R. Co., 25 App. D. C., 5.

In the case of Benedict *v.* Potts, 88 Md., 52, the Court of Appeals of Maryland says:

"The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical fact produced that injury, but it means that when the physical act has been shown, or is apparent, and is not explained by the defendant, the conclusion that negligence snperinduced it may be drawn as a legitimate deduction of fact."

The case of Kohner *v.* Capital Traction Co., 22 App. D. C., 181, and the cases therein cited, are ample authority in support of this proposition, and it is submitted that this case is clearly controlled by the doctrine of *res ipsa loquitur* as laid down therein.

Cassady *v.* Old Colony St. R. R. Co., 68 N. E. Rep., 10.
Met. R. R. Co. *v.* Falvey, 5 App. D. C., 176.
Kight *v.* Met. R. R. Co., 21 App. D. C.

IV. As to the Fourth Proposition.

The only specific grounds of objection offered by counsel for appellee to the introduction of testimony of appellant's witness, Richard F. Preusser, was stated as

follows (Rec., p. 23): "If he is offered as a witness to impeach in any way the Parmenter fender, I object to it as entirely immaterial."

And the objection to the testimony of the witness Preusser appeared to be predicated upon the theory that the use of the Parmenter fender having been authorized by ordinance of the Commissioners of the District of Columbia, under authority of an act of Congress, its use and operation by the appellee were exempt from criticism, attack or impeachment.

These provisions of law and ordinances are set forth in full on pages 18 and 19 of the Record, and in this brief *supra*, and appear to completely refute this theory.

The act of Congress (Rec., p. 19) requires that the fenders shall be "*proper fenders for the protection of the lives and limbs of all persons within the District of Columbia,*" and also provides "*that nothing contained in this act shall operate to relieve any street railway company of liability for accidents on its lines.*"

And the ordinances of the District Commissioners (Rec., pp. 18, 19) throw all the burden of selection of the *proper fender* upon the railway companies—including the appellee—by approving for use *five* different fenders (including the *Parmenter* and *Preusser*) with a proviso for the *substitution* "of any other fender or wheel guard" which might be subsequently approved by the Commissioners, thus leaving it open to and the duty of the appellee to select and use the most meritorious fender named, and to suggest to the Commissioners for approval and use any other known fender better adapted for the purpose required.

If either one of the other four fenders approved by the Commissioners was a safer and better fender in its use and operation than the *Parmenter* "for the protection of the lives and limbs of all persons," it was incumbent

upon the appellee, under the said law and ordinances, to use and operate such other fender.

And the said law and ordinances are but supplementary of the requirements of the common law respecting the exercise of a high degree of care by common carriers of passengers.

"The law requires a very high degree of care on the part of a street railway company in the operation of its road, occupying as it does the streets and avenues with its tracks and cars to its own profit, under a franchise granted primarily in the interest of the public."

Barstow *v.* Capital Traction Co., 29 App. D. C., 362.

"It requires common carriers, by the exercise of the greatest care and precaution against the occurrence of all accidents, to provide appliances for the safe transportation of all conditions of people entitled to be carried. The old and the young are alike entitled to be carried safely. * * * Accidents, sometimes, are extraordinary in their character, and it is difficult to anticipate their occurrence; but if there be negligence or want of proper degree of caution and prudence on the part of a carrier, the extraordinary nature of the accident will not excuse for liability. The very object of the strictness of the rule in requiring the highest degree of care and foresight to be exercised, is to avoid all possible accidents and injury."

Metropolitan R'd Co. *v.* Falvey, 5 App. D. C., 176; *and authorities cited.*

"But aside from this special duty there is a *continuing duty* and obligation resting upon the company, in consideration of its use of the public streets, to consult *all the time* the safety and convenience of travelers thereon, consistent with the full enjoyment of its own privileges and franchises. The company has no greater right to the use of the streets than the public, and it being thus a joint use of the street neither the company or the public has any right to make it dangerous for either in their proper use of it."

Fitts *v.* Cream City Ry. Co., 59 Wis., 323, *and cases therein cited.*
Hogan *v.* City Ry. Co., 150 Mo., 36.
Atlantic Ave. Ry. Co. *v.* Van Dyke, 72 Fed Rep., 458.
Richmond Ry. & Elect. Co. *v.* Garthwright, 92 Va., 627.
Kingman *v.* Lynn & B. R. Co., 64 N. E. Rep., 79.

And, even if the appellees were *restricted* to the use of the *Parmenter* fender by municipal ordinance, that fact would not absolve it from its duty and obligation to its passengers and the public (nor for liability in event of failure) to use, maintain and operate that fender most prudently and carefully, and in the safest way possible "for the protection of the lives and limbs of *all persons* within the District of Columbia," and its acts of maintenance and operation would be proper subjects of inquiry and impeachment.

In Osgood *v.* Lynn & Boston Ry. Co., 130 Mass., 492, the trial court was asked by the defendant to rule that

"If the tracks of the defendant corporation were constructed in conformity with the requirements of the municipal authorities, and to the satisfaction of the superintendent of streets, the defendant would not be liable for any injury resulting from the mode in which the tracks were laid."

The court declined so to rule, and was sustained by the appellate court which said:

"If a street railway corporation, by the carelessness of its servants or agent, constructs its tracks so as to *create a nuisance or defect in the street*, the law makes it liable to any person injured by such carelessness, and the fact that the superintendent of streets is satisfied with the construction does not make it any less a defect, or exoner-

ate the corporation from its liability to any person injured."

In Dalzell *v.* Indianapolis & C. Ry. Co., 32 Ind., 45, the court held:

"The fact that a street railroad in constructing their tracks through the streets of a city have complied with all the requirements of an ordinance of the city authorities prescribing the manner in which the road shall be constructed, and that the construction of the road has been examined and approved and accepted by an agent of the city, charged with the duty of such examination, is not a defense to an action by an individual, crossing the track, for injuries received for defects in its construction."

In Houston City Street Ry. Co. *v.* DeLesderia, 84 Texas, 82, it is decided that

"The fact that a street railway company constructs and maintains its track under the authority and in accordance with the direction of the city, does not exempt the company from liability for injuries occasioned by the negligence in such construction and maintenance."

Also holding the same doctrine—

Houston City Street R. Co., *v.* Richart, 27 Tex. Ap., 920.
Munson *v.* Manhattan R. Co. 55 N. Y. Supr. Ct., 18.
Dormingues *v.* Orleans R. Co. 35 La. An., 751.
Cleveland *v.* Bangor Street Ry., 86 Main, 232.
And authorities cited in the foregoing cases.

It is clear, therefore, that the concurrence of the District Commissioners in the use of the Parmenter fender on the cars of the appellee does not render it immune and exempt from liability occurring through its imprudent and negligent use, or maintenance, or operation of its

fender as a dangerous obstruction in the public street, a snare for the feet of the traveler and a trap for its unwary passenger.

The *fourth count* of the declaration (Rec., pp. 11–14) was specially relied upon in the trial court, and, in common with the other counts, contains averments charging the defendant company with the duty of adopting and using a safe and proper fender and with negligence in knowingly and negligently adopting and equipping its cars with an unfit and unsafe fender (Rec., p. 12), as well as charging negligence in its manner of use and operation of said fender at the time of the accident.

In Richmond Railway and Electric Co. *v.* Garthwright, 92 Va., 627, the court says:

"It is error to instruct the jury that if an accident might have been avoided by the use of a Sprague motor on the street car then the defendant was guilty of negligence in not using it, *if it had not been shown by the evidence that the motor was a safer and better appliance than the one in use, nor that it had been tested and its superiority over the other demonstrated.*"

The clear and expressed purpose of introducing the testimony of the plaintiff's witness, Preusser, was to show that the Preusser fender was a safer and better appliance than the one in use by the defendant company, and that its superiority over the other had been demonstrated.

The testimony of the witness, Preusser, was, therefore, competent and material and relevant to the plaintiff's case.

He testified (Rec., pp. 22, 23):

"I am a locksmith and machinist; have followed that occupation at least forty years; am in business now at 712 Eleventh Street, Northwest; have given attention and study to the construction and operation of street car

fenders; am an inventor myself of a fender, and consequently I studied that for over twelve years; I took out eight patents on fenders.''

Why was he not an expert witness on street car fenders?

The Parmenter fender was exhibited in court before the jury (Rec., p. 20) and its construction and method of operation shown and testified to. The witness, Preusser, was clearly competent as an expert to testify to the relative merits of construction and operation, as protectors of life and limb, of the fender in the court-room, before him, and the fender he had invented and which had also been adopted by the District Commissioners for the use of the defendant company. And if his testimony disclosed the fact of the superiority of the Preusser fender, and that its use and operation would have avoided the fatal injury to plaintiff's deceased, then the question of defendant's negligence in its continued use and operation of the fender that occasioned the accident would have been for the jury.

In the case of the C. C. C. & St. L. Ry. Co. *v.* John McKelvey *et al.*, 12 Ohio C. C., 426, the court held:

''The obligation of this company, imposed by statute, was to equip this engine with some appliance or contrivance which would effectually guard against the emission of fire and sparks which would otherwise have been thrown out. The alleged negligence was the omission of this duty on the part of the company. * * * We have no doubt that it was entirely competent to aid the jury in the investigation by the testimony of expert witnesses covering the different kinds of netting that was used, to show the appliances with which each would guard against the emission of sparks, and *educate the jury* up to a point that *they might say* whether this particular appliance used upon this engine was the proper appliance or otherwise. * * * The witness had shown himself to be conversant with that class of business, and the sub-

ject was one upon which testimony might reasonably be asked."

Transportation Line *v.* Hope, 95 U. S., 297.
Lawson on Op. & Expert Ev., 2d Ed., 229, 239, 507, 578.
Mayor of New York *v.* Pentz, 24 Wendell, 668.
Fitts *v.* Cream City Ry. Co., 59 Wis., 323.
B. & P. R. R. Co. *v.* Elliott, 9 App. D. C., 341.
Dist. of Col. *v.* Haller, 4 App. D. C., 405.

And it should be noted that it was not "opinion evidence" that was offered, but evidence of facts upon the construction and methods of operation as safety appliances, within the knowledge of the witness as a practical mechanic, and student and inventor of car fenders; and that it was not proposed to take the witness afield among all the latest improvements, but to confine him to the relative merits, as safety appliances, of two fenders well known to the defendant company as having been approved for their use by the municipal authorities—the one in 1897 the other in 1905.

The foregoing facts and authorities considered, it appears clear that Preusser was a competent witness, and his testimony material and relevant to the appellant's case, and that its exclusion was prejudicial error.

It is, therefore, respectfully submitted upon the whole case that the court below erred in its rulings and instruction, and that its judgment should be reversed and the case remanded for further proceedings.

RICHARD P. EVANS,
Attorney for Appellant.

In the Court of App

OF THE DISTRICT OF COLUMBIA.

No. 1992.

MARY A. JAQUETTE, EXECUTRIX,
APPELLANT,

vs.

CAPITAL TRACTION COMPANY, ETC

**Brief for Capital Traction Comp
Defendant and Appellee.**

R. ROSS PERRY,
R. ROSS PERRY, JR.
G. THOMAS DUNLO
Attorneys for Ap

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1992.

MARY A. JAQUETTE, EXECUTRIX, ETC., APPELLANT,

vs.

CAPITAL TRACTION COMPANY, ETC.

Brief for Capital Traction Company, Defendant and Appellee.

I.

Short Statement of Case.

This is an action upon the case for negligence brought by the plaintiff, Mary A. Jaquette, widow and executrix of Isaac G. Jaquette, deceased, against the Capital Traction Company. The declaration contains four counts which do not materially differ from each other save that the fourth count, filed as an amendment to the said declaration, declares that the deceased was a passenger of the defendant corporation, which is a local street-car company. All four counts are based upon alleged negligence of the defendant, under the following circumstances: According to the declaration filed by the plaintiff, a northbound train of the defendant company, on the 25th day of December, 1906, was standing in front of Thompson's drug store, on Fifteenth street between G street and New York avenue northwest, at the

regular stopping place at that point. At the same time and place was a southbound train immediately alongside of and concealed by the northbound train, the fender of the southbound train projecting beyond the rear of the northbound train. The decedent, Isaac G. Jaquette, desiring to take passage on the southbound train, crossed behind the northbound train. The southbound train was about to start, but the conductor, seeing the decedent approaching, held his car, which did not move. In his hurry to get across the east track so as to take passage on the southbound train the decedent tripped over the fender of the motor of the southbound train and fell. In consequence of the fall he sustained a fatal fracture of the hip. His widow who is also his executrix brings this suit claiming that the railroad company was negligent because it had a fender which is variously stated in the different counts to have been of improper construction, to have been out of repair, and to constitute a trap for persons who had to pass in its vicinity.

Of course the pleadings in the case are only important to the extent that the evidence supports them. It will appear from the record (pp. 18 and 19) that the motor-car in question was equipped with a type of fender authorized by the police regulations of the District of Columbia. There is no testimony whatever to show that on the occasion in question a northbound car was standing at the point in question, or that the fender was out of repair or failed to operate.

The principal witness called by the plaintiff was Grace W. Evans, an impartial witness and the only one who observed all the circumstances of the accident. A summary of her testimony will be found at page 22 of the record. She had just gotten off of the Fourteenth street car which had come south, intending to transfer to the Georgetown line, and was

standing right at the front of the car at the time of the accident, on the west side of the street. She was standing about on a line with the corner of G street, where she could observe the approaches to the fender on that car, about two feet from the fender. She says:

> "I stepped off of the car and was waiting for the car to pass on so that I could cross the track on the other side and take the car en route for Georgetown. While I was waiting for this car to pass, this 14th street car, I saw a gentleman running down the street hurriedly. That is, after he had left the crossing he ran to the car and motioned to the motorman to hold the car until he could alight—until he could get on the car. Well, the motorman's attention was attracted and he was holding the car, but in the eagerness of the gentleman to get on the car he stumbled and fell. My escort went to his assistance, at my suggestion; and also at my suggestion some other gentleman, because he was not really able to be lifted by one gentleman. They started to put him on the car, as he said that was the car he was going to take; but I imagined that he might be suffering, so I also suggested that they take him in Thompson's drug store where it might be necessary to summon an ambulance, so that he might receive proper treatment. My escort helped him to the drug store with the assistance of some other gentleman, and I waited on the corner. He came back to me and then we went on our way to church.
>
> "Q. (By counsel for plaintiff.) You say he stumbled. What did he stumble over?
>
> A. He stumbled over the fender of the car.
>
> Q. Did you notice anything that would indicate that the car was about starting at that time?
>
> A. Yes; the starting bell had rung. That is the reason the gentleman tried to attract the attention of the motorman to hold the car for him. He succeeded in attracting attention and the car was waiting.

Q. Just one more question. Did you notice whether or not at the time he stumbled over the fender the motorman had dropped the fender, or was it stationary?

A. No, I did not notice at all, because I am not used to observing those small details."

This was all the evidence that was offered by the plaintiff with respect to the particulars of the accident. The court thereupon directed the jury to find a verdict for the defendant.

II.

ARGUMENT.

Inasmuch as this brief is necessarily written not only with no knowledge of the contents of brief for the appellant, but also in ignorance of his assignment of errors, counsel for the appellee are compelled to take up the exceptions of the appellant and consider them in order.

First Exception.

The appellant's first exception will be found on page 20 of the record. The following question was asked the witness, David S. Carll, chief engineer and superintendent of the defendant:

"Now, Mr. Carll, what is the position of the front part of the fender, when it is in perfect condition, is it level and parallel to the pavement or track, or has it got an upward tilt in front?"

Objection was made to this question because of the use of the words "perfect condition," which objection was sustained by the court, to which ruling of the court the plaintiff then and there excepted.

Even if this exception were well taken it would be

valueless because, as the record shows, the witness testified "that when the fender is in a reasonably proper condition it probably tips up in front a little as a rule, but it is immaterial."

Here is the testimony of the appellant's own witness that whether or not one end of the fender was slightly higher than the other would be an entirely immaterial thing.

The vice, however, of the question is patent. There is no rule of law which requires a common carrier to maintain its appliances in "perfect condition." While there are numerous authorities to the effect that the common carrier is, in the proper discharge of its duty towards its passengers, required to use the highest degree of care, there is yet no authority which demands that any act of any of its employees shall be "perfect," nor is it required that the condition of any of its appliances shall be "perfect." The standard of perfection is not attainable in this life.

Second, Third, Fourth, and Fifth Exceptions.

The second, third, fourth, and fifth exceptions (Rec., pp. 22, 23, and 24), can conveniently be considered together. It had already appeared from testimony introduced by the plaintiff (Rec., pp. 18 and 19) that among the fenders authorized by the Police Regulations was the Parmenter fender It further appeared from the testimony of the said witness, David S. Carll, also called by the plaintiff, that the defendant used on the occasion in question, had always used on its Fourteenth street line since 1898, and was still using, the said Parmenter fender. In the face of this testimony counsel for the plaintiff offered to introduce (Rec., p. 22) the testimony of Richard F. Preusser, who testified that he was a locksmith and machinist, who had for a long time given attention and study to the construction and operation

of street-car fenders; that he had himself invented and patented a street-car fender; that he was the inventor of the Preusser fender, which was one of the types authorized by the said Police Regulations. On page 23 of the record it appears that he was asked by counsel for the plaintiff the following question:

> "Do you recollect when you took out the first patent?"

This was objected to by counsel for the defendant on the ground that the matter inquired about was immaterial. Whereupon counsel for the plaintiff, in answer to a question of the court, made the following statement (Rec., p. 23):

> "The point is right here, that under the declaration in this case the company is charged with having, and using, and operating an improper fender, an inadequate fender, an unfit fender, and under the order of the District Commissioners they authorize this company to adopt five different fenders. As was testified one of those fenders was the Preusser fender. Now the question arises, and it is one that I shall urge, as to whether the company has adopted the fender that was intended by the act of Congress, to preserve the lives and limbs of the people in the District of Columbia. As your Honor will recollect, it was testified by Dr. Tindall that the Parmenter fender was authorized in 1897; that the Preusser fender was adopted in 1905, and your Honor can readily see the inference that might be argued from that.
>
> "The COURT: If you want to get it into the record, to state your reasons, so as to save an exception, very well. Now put your question and I will pass upon it.
>
> (The stenographer read the pending question as follows:)
>
> Q. What is the date of the last patent you took out?
>
> Mr. PERRY: That I object to as irrelevant.

The COURT: If it is merely introductory to something that is relevant, of course I would not heed the objection; but what is it you expect to show? It is introductory to what?

Mr. EVANS: It is introductory to this, if your Honor please. That the patent which was issued to this inventor was adopted by the District Commissions ten years nearly, or eight years later, at least, than the appliance that was approved and which is now being used by the Capital Traction Company.

The COURT: What bearing has the character of this fender upon the case—in the light of the testimony?

Mr. EVANS: It has this bearing in the light of the testimony, to my mind; to prove by this witness that this fender, which was authorized and adopted by the District Commissioners, was one that by its operation could have avoided this accident or any similar accident.

The COURT: The objection is sustained."

To this ruling the counsel for the plaintiff noted his second exception.

"Q. Mr. Preusser, what is the difference in the operation of the fender which the District Commissioners adopted and authorized known as the Preusser fender, in dropping and withdrawing in case of coming in contact with any object or person, as distinguished from the same appliance on the Parmenter fender?

Mr. PERRY: That is objected to for a great many reasons.

The COURT: The objection is sustained."

To this ruling the counsel for the plaintiff noted his third exception.

"Q. Mr. Preusser, in the operation of your fender, does it drop to the ground or is there any method or appliance by which it draws back out

of the way, and as well affords a cushion for the reception of any object that might fall into it?

Mr. PERRY: That is objected to as incompetent and irrelevant.

The COURT: The objection is sustained."

To this ruling the counsel for the plaintiff noted his fourth exception.

"Mr. EVANS: Now, if your Honor please, I offer Mr. Preusser as an expert on the construction and operation of fenders; and as an expert I wish to introduce his testimony as to the relative merits of the two fenders which have been referred to, the Parmenter fender, and the Preusser fender, which have both been approved by the Commissioners of the District of Columbia for use on the street-cars in the District.

Mr. PERRY: I object to that as irrelevant and incompetent.

The COURT: The objection is sustained."

To this ruling the counsel for the plaintiff noted his fifth exception.

It will be observed that the only specific offer made in connection with any of these exceptions is contained in Mr. Evans' last statement, to wit:

"As an expert I wish to introduce his (Preusser's) testimony as to the relative merits of the two fenders which have been referred to, the Parmenter fender, and the Preusser fender, which have both been approved by the Commissioners of the District of Columbia for use on the street-cars in the District."

It need hardly be argued that this was an absolutely immaterial subject. Even if it were material there is no offer by counsel to prove that the Preusser fender is superior to the Parmenter. The only offer is of testimony to prove "the relative merits of the two fenders"

without any statement as to which of the two would be shown by said testimony to be superior. The only other suggestion made by Mr. Evans will be found on page 23 of the record, as already set forth, and concerns only the alleged fact that the Preusser fender was a later invention than the Parmenter fender. If that were a fact it would be nevertheless immaterial. We thus see that there is not a word of testimony in the case to in any way impeach either the character or the condition of the Parmenter fender used by the defendant Company on the occasion in question. On the contrary the record shows that the Parmenter fender has been continuously used by the defendant company under the authority of the said police regulation, and consequently with the approval of law.

The rule of law is well settled that a common carrier complying with the provisions of the Police Regulations or other ordinance is not chargeable with negligence. Campbell *vs.* R. R. Co., 139 Pa. St., 522.

> In this case the plaintiff while crossing a street at night stepped into a depression in the paving extending under the track of a passenger railway company. Her foot thus getting under one of the rails she was tripped thereby, fell and was injured. It appeared from the evidence that it was the duty of the railway company to keep the paving in repair, but the depression in question was maintained under the direction of the city, as a means of draining the street, and it was kept in the condition in which the city required it to be kept. Upon these facts the court held that the railway company, being subject to the city's control as to the maintenance and repair of the street, was not chargeable with negligence in maintaining the drain as directed by the city and was not responsible for the plaintiff's injury if its sole cause was the existence of the drain.
>
> The court further held that the railway company would be liable for the plaintiff's injury if it

was caused by its negligence in failing to keep the drain in repair; but the condition in which it maintained the drain as prescribed by the city could not be evidence of such negligence, nor could the occurrence there of other accidents while so maintained.

Mayberry *vs.* R. R. Co., 9 W. N. C. (Pa. C. P., 1880), 404. Court says concerning an act of assembly:

"It is provided that the company shall keep the streets and avenues traversed by the said railway in perpetual good repair at their own expense. This is the usual stipulation in the railway acts of incorporation of this city and obliges the company to maintain the highway in safe repair its whole width, from curb to curb, and in fact this company did construct this gutter and covering agreeably to the ordinance of council and under the supervision and plans of the commissioner of highways. For any defect in the plan or mode of construction the company are not liable, but, constructed as it is, they are bound to keep it in proper order and repair and safe for travel."

Suit for personal injury for having plate over gutter improperly secured.

Buente *vs.* Traction Co., 2 Pa. Sup'r Ct., 185:

"An ordinance requiring that all passenger railway companies shall be provided with "the most improved modern pilot or safety guard" is an attempt to establish a higher measure of duty than the law fixes and can not be invoked. The court cites Henderson *vs.* R. R. Co., 144 Pa. St., 461, as follows: "It is the duty of railway companies to adopt the best precautions against danger in general use and which experience has shown to be superior and efficient and to avail themselves of every such known safeguard or generally improved invention, to lessen the danger."

In the case of McKeon, respondent, *vs.* Citizens Railway Company, appellant, 42 Mo., 79, a passenger sued

the street railway company for injury done to him by reason of the negligence of the driver of the car. The railroad company defended under an act of the legislature providing that, "Railroad companies shall not be liable for injuries occasioned by the getting off or on the cars at the front or forward end of the car." The court say (page 85):

> "The effect and intention of the statute would seem to be that where the injury to the passenger is occasioned by his getting off or on the car at the forward platform it shall be presumed as a matter of law that the negligence of the passenger himself contributed to produce the accident and injury, and it is therefore declared that the company shall not be liable in such case. A like construction was given to a somewhat similar statute provision in the case of Higgins *vs.* Hann. and St. Jo. R. R. Co., 36 Mo., 436.
>
> . . . . . .
>
> "If the accident and injury were occasioned by reason of such attempt to get on or off the car at the front end the defendant under the statute would be relieved from liability though guilty of some negligence, and without reference to the question whether it was in fact the negligence of the one party or the other which actually caused or produced the injury. But again, if the injury were occasioned by the negligence of the driver, in intentionally starting the horses, or in carlessly allowing them to start forward, while the man was lying underneath the car, that would be an independent act of negligence for which the company might be liable; it would raise a question of the capacity, competency, and fitness of the servant for such a place."

The case of Nolan *vs.* Brooklyn City and Newton R. R. Co., 87 N. Y. R., 63 (42 Sickels), was a case in which a passenger was riding upon the front platform of the defendant company's car and was injured. The railroad

company defended under the provisions of the general railroad act of New York. That act relieved railroad companies from liability where they posted in their cars a warning against riding on the platform and furnished a seat to the passenger within the car. The court, however, decided that the company in the case in question had not posted in their car such a warning as the law required, clearly holding that if such notice had been posted there would have been no liability.

The point in question here is even stronger for the defendant. The legislative authority has not permitted them to use their own judgment about fenders, but has prescribed what sort of fender shall be used. The defendant has complied with the law. To insist that the fender so legally designated is an improper fender is not to impugn the railroad company but the legislative authority.

At the trial counsel for the plaintiff cited the following authorities:

Wooley, respondent, *vs.* Grand St. and Newtown Railroad Company, Appellant, 83 N. Y. R., 121.

> In that case the plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of B., to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable; that defendant had put salt on its tracks which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. In an action to recover damages, *Held*, that the evidence justified the submission of the question of defendant's negligence to a jury.

This case has no application to the case at bar. There was no ordinance prescribing the particular sort of

switch which should be used. There was evidence tending to show that the defendant company had been negligent with respect to the keeping of the switch in proper condition.

The court at page 126 indicate what questions are proper for a jury, to be considered in a case where the legislature has not itself prescribed the character of switch that should be used. The court say:

> "The defendant might have adopted a kind of switch that experience had condemned, or refused to adopt one that experience had shown to be the best, or among the best; or using the latter, had at first put it down carelessly or unskillfully; or having at first put it down well, had suffered it or the pavement about it to get out of proper position relatively or otherwise, so that there was at first or at last an obstruction in the public way needlessly and unreasonably dangerous to passers over it. These were questions for a jury to try and determine. And if they had testimony which raised them or either of them, and there was no error in the submission of the case to their consideration, their verdict is conclusive."

Hogan *vs.* Citizens' Railway Company, 150 Mo., 36:

In this case a child 7 years of age was run over by one of the defendant's trains of cars. One of the acts of negligence alleged against the defendant was failure to use ordinary care in providing the grip-car with a fender to prevent its running over the children it had run down and upon. The court say (page 48):

> "No claim is made here that there was any law of the State or any ordinance of the city which made it the duty of the defendant to place fenders on its cars. The obligation to do so, therefore, must be found in the common law, if there is any such obligation resting upon the defendant. It is not claimed that the common law expressly

imposed any such obligation, but it is claimed that 'defective appliances or no appliances at all or insufficient appliance is a question of negligence for the jury.' The obligation of the common law is that the defendant shall exercise ordinary care to prevent injury to the public. No particular kind of appliance is required to be used. It is only necessary that the defendant should have used such means to prevent injury to the public as a man of ordinary prudence would have used under the same circumstances. To predicate a charge of negligence upon a failure to use any particular kind of appliance is insufficient, especially in the absence of any averment that the appliances and means employed by the defendant were not reasonably safe. As between master and servant, the master is not required to furnish the best and safest known appliances. It is enough that what he does furnish are reasonably safe for the purposes for which they are intended and used. So with respect to its common law duty to the public, it is not whether there are known appliances which the defendant did not use, but whether the appliances it does use are such as a person of ordinary prudence would have used, which determines the question of its negligence."

The court further say that—

"there must be either an averment that some statute or ordinance made it the duty of the company to place fenders on the cars, or if there is no such law, then under the common law the company is required to use only such appliances as a man of ordinary prudence would use under the circumstances, and the mere absence of a fender did not imply that the car was not reasonably safe."

Atlantic Avenue R. Co. *vs.* Van Dyke, 72 F. R., 458:

In this case, also, there was no municipal ordinance. The evidence showed that the car had no sand box to sand the track and enable the brake

> to work effectively; that none of the defendant's cars had sand boxes, but that defendant, at certain seasons of the year, not including that at which the accident happened, caused the track to be sanded by sending out a special car to scatter the sand, which defendant claimed to be a better method. The court charged the jury that the only question was whether the car had proper appliances for stopping it; that the defendant was not bound to provide the very best appliances, but to provide what is reasonable, and such as a prudent man would provide, and left it to the jury to determine whether the car had reasonable appliances for stopping, or there was a lack of what it really ought to have had, which prevented its being stopped and caused the accident.

Richmond Railway and Electric Co. *vs.* Gartright, 92 Va., 627.

In this case the court decided that—

> "it is incumbent on a railway company whose cars are propelled by steam or electricity to provide its cars with suitable and safe machinery, and to use ordinary and reasonable care to avail itself of all new inventions and improvements known to it, which will contribute to the safety of its passengers, and prevent accident to others; but it is not required to have in use the latest improvements which human skill and ingenuity have devised to prevent accidents."

Here, again, there was no ordinance, and the decision is not apposite.

Delzell *vs.* R. R. Co., 32 Ind., 45:

This case only decides that where a railroad company has done work of a general character required by an ordinance, which ordinance does not specify the details of the work, and has done that work in an improper manner, the mere fact that it has when completed been

approved by an agent of the municipal authority does not relieve the company from responsibility.

In the case at bar the ordinance has prescribed the specific thing that is to be used, to wit, a mechanism known as the Parmenter fender. It was not offered to be proved that the particular Parmenter fender in use was in any wise imperfect or in any wise varied from the standard set by the law. Consequently the Indiana case is inapplicable.

Houston City Street Railway Company *vs.* Mrs. E. J. Delesdernier, 84 Texas, 82:

This case decides that—

> "if a street railway track upon a public street by negligent construction or otherwise becomes unsafe to the public, it is no defence that by contract with the city and the railway there should be no liability, nor that the track had been laid as directed by the city authorities. The city can not contract so as to justify negligence to the injury or impairment of the safety of the public. If the city join in the unlawful act it would also be liable."

This case is only authority for the proposition that a municipal corporation can not authorize the violation of law. It can not legalize a nuisance. It is no authority whatever for the proposition that where the law requires a particular device to be used, persons using such device shall be made responsible by reason of such use because the device itself is, in the opinion of an expert, not as good as the particular device patented by the expert witness himself.

R. R. Co. *vs.* McKelvey, 12 Ohio C. C., 426:

This was an action against the railroad company, appellant, for setting fire to an adjacent field through insufficient spark arrester on the engine. The court held

that it was proper to introduce expert witnesses to show different kinds of nettings used by different railroads to guard against sparks, in order to enable the jury to say whether the particular appliance used was a proper one; but the court further held that to charge one company with negligence by showing that another company used a different appliance was incompetent. At page 430 the court say that there was an obligation—

> "imposed by statute to equip this engine with some appliance or contrivance that would effectually guard against the emission of fire and sparks which would otherwise be thrown out."

Manifestly if there had been such provision of law and if the lawful authority had specified different types of spark arresters which must be used, the decision of the court would have been that the company complying with such express legal direction would have been protected in so doing.

This discussion, however, is general. The record in this particular case shows that the Parmenter fender was one of those required by law to be used. There is no evidence that it is not the best fender that can be used. The only evidence offered by the plaintiff which was rejected was evidence tending to show that the Preusser patent was later in date, and also evidence of the Preusser patentee as to the relative merits of the Parmenter and Preusser fenders, with no statement whatever as to whether or not that evidence would show any degree of superiority, or if so what degree of superiority, between the two patented articles.

Sixth Exception.

The sixth and last exception is to the action of the court in directing the jury to return a verdict for the defendant upon the whole evidence.

Inasmuch as this motion covers the entire record in the case, both pleadings and evidence, it will be necessary to consider several topics.

A.

Was the Plaintiff's Intestate a Passenger of the Defendant Company on the Occasion in Question?

The court ruled (Rec., p. 25) as follows:

> "The evidence in this case is wholly inadequate to sustain the contention that the deceased was a passenger upon the defendant's car. On the contrary, it clearly shows that he was not a passenger, although he was at the moment he was injured seeking to become a passenger. That is all I care to say about that."

The only question that can arise with respect to this language of the court is verbal. As the court accurately said, the decedent was an intending passenger. There are cases in which it becomes important to determine that a man is a passenger before he actually gets upon the car. We have had local cases emphasizing this importance. Many cases can be imagined, and many have actually happened, where it is unimportant with respect to the duty that a common carrier owes to its passengers, whether the passenger has actually paid his fare while in the conveyance of the carrier or has entered the station of the carrier expecting to take passage and prepared to pay his fare. The carrier owes a duty to the intending passenger while he is in its station as well as while he is in its car. It is also its duty not to negligently run one of its trains by a station or platform while another one of its trains is discharging passengers at said station or platform. Such instances need not be multiplied. They have, however, no relation to the case at bar. While the Capital Traction Company's train was at rest at the time and place in question it

is difficult to see wherein the situation of the decedent differed from that of any other citizen. Every other citizen had the right to cross the track in front of the southbound train just as the decedent had. It may be true that the company would have been bound to use greater care with respect to the starting of its train in the case of the decedent than in the case of a third person. But the train did not start. If the fender was a trap it was such to anyone going near it. There was no act performed or omitted by the company's servants on the occasion in question towards the plaintiff. There was simply a physical situation patent to the senses of everyone. Moreover, there was a situation which must have been anticipated by everyone. Every person in the District of Columbia, save a very young child, knows that every motor-car has a fender. Not only that, but every person is charged with knowledge that the motor must have a fender; the law requires it. Whether a man intends to get on a street-car or merely to pass in front of it, he is charged with the knowledge that the motor-car has a fender to it. The only obligation which the company owed, and this it owed to the public generally, was to have a legal fender. If the fender was illegal it was a public nuisance both as to passengers and the public generally.

This has been explicitly decided by the Supreme Judicial Court of Massachusetts in the case of William Duchemin *vs.* Boston Elevated Railway Company, 186 Mass., 353. This was an action of tort for injuries caused by the trolley pole and a sign of a car of the defendant falling upon the plaintiff, as he was about to enter the car. The court say (p. 353):

> "The action is for a personal injury occasioned by the fall of a trolley pole and car sign. The case stated in the declaration is that as the car approached the plaintiff he went toward it for the

purpose of entering it, having given the motorman in control notice of his intention so to become a passenger, and that as he was about to get on the car the trolley pole fell striking a sign upon the car and the pole and sign struck the plaintiff, he being in the exercise of due care and the defendant negligent. At the trial the testimony of the plaintiff and of one passenger on the car tended to show that when the pole and sign fell the car was stationary, and the plaintiff in the act of boarding it, having either one foot or both feet on the running board."

. . . . . .

(Page 356): "This leaves as the turning point of the case the question whether a foot-traveler on the highway who is approaching a street-car stopped to receive him as a passenger, and before he actually has reached the car, is entitled to the rights of a passenger in respect of that extraordinary degree of care due to passengers from common carriers, at least so far as any defect in that car is concerned.

"In other words the question is whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car and had not yet reached it that it would owe to a passenger.

"It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth or the street clear of obstructions to his

progress than it owes to all other travelers on the highway. It is under no obligation to see that he is not assaulted, or run into by vehicles or travelers, or not insulted or otherwise mistreated by other persons present.

"Nor do we think that as to such a person, who has not reached the car, there is any other duty as to the car itself than that which the carrier owes to all persons lawfully upon the street. There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street-car and that of one who is about to take the car but has not yet reached it. In the case of each the only logical test to determine the degree of care which the person is entitled to have exercised by the street railway company is whether the person actually is a passenger, or is a mere traveler on the highway. We think that a present intention of becoming a passenger as soon as he can reach the car neither makes the person who is approaching the car with that intention a passenger, nor changes as to him the degree of care to be exercised in respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others.

"The defendant incurs no responsibility to exercise extraordinary diligence by making an express contract, but only by its exercise of the calling of a common carrier, and its obligation as such does not arise until the intending passenger is within its control. We are unwilling to go farther than the doctrine stated in Davey *vs.* Greenfield and Turner's Falls Street Railway, 177 Mass., 106, that when there has been an invitation on the part of the carrier by stopping for the reception of a passenger any person actually taking hold of the car and beginning to enter it is a passenger. See, Gordon *vs.* West End Street Railway, 175 Mass.; 181, 183, and cases cited.

"If the instructions allowed the jury to find for the plaintiff only in case the car had reached a

> usual stopping place and had stopped to receive him, there was error in ruling that under those circumstances and before he had actually reached the car he had a right to have the defendant exercise as to him that extraordinary degree of care due to passengers. So long as he remained a mere traveler on the highway, although walking upon it for the sole purpose of taking the car, the defendant did not owe to him any other duty than that which it owed to any person on the highway. Whether one just has dismounted from a street-car, or just is about to board one he does not have the rights of a passenger."

To the same effect is the case of Mary J. Donovan *vs.* The Hartford Street Railway Company, 65 Conn., 201. In that case the plaintiff, intending to take an approaching street-car of the defendant, stepped out upon a cross-walk and gave the usual signal which the driver of the defendant saw and answered affirmatively. Just before the car reached the cross-walk it was unexpectedly deflected to a side track on which the plaintiff was standing and struck and injured her. *Held*, that the relation of passenger and common carrier did not exist between the plaintiff and defendant at the time of such injury.

The court say (p. 212):

> "Again, the injury is not alleged to have been received by reason of the failure of the defendant's servants to acknowledge or respond to, or to comply with, the signal of the plaintiff; nor that they failed to use proper endeavors to stop, or in fact to stop, as soon as they should have done, in order to receive the plaintiff on board, at the place desired by her, but the allegation is that the car while going was so carelessly and negligently managed and directed as to turn from the track where it should have gone, and ran against the plaintiff. Now, it is manifest that here is no allegation of a cause of action growing out of the relation of carrier and passenger, in express terms,

and according to the rules of pleading, which require direct statements, and exclude those by way of argument or inference merely, which demand the averment of ultimate and issuable, not of probative or evidential, facts. While, therefore, what the plaintiff's counsel say in their brief, referring to the Connecticut Practice Act, pages 57, 58, 59, is correct namely, that 'the forms adapted to suits of this character all contain the allegation that the defendant was a common carrier, it is equally true that they all contain also other allegations making such averment relevant, showing a contract, undertaking or duty; or a liability of the defendant to the plaintiff, growing out of the relation of the parties, which is here utterly wanting, so far as any direct or positive statement is concerned.

"But more than this, the facts stated in this complaint are not such as even indirectly, and by way of evidence or inference, tend to indicate, either the existence of the relation of carrier and passenger between the parties, or, if we were to assume such relation, that the cause of action was in any way founded upon it. The negligence relied on was such as might just as well arise in any case where two persons were using the public street, each lawfully, but each independent of the other, and of course in any such case it would not matter that one of such persons was a common carrier. Even if it could be held—and no case we think can be found anywhere that would be a precedent for the ruling—that the defendant was under a special duty imposed upon it by law, to stop its car so as to safely receive the plaintiff as a passenger, there is, as we have seen, nothing in the complaint adapted to recovery for a breach of such duty. It was not in fact claimed that any injury was so received, but instead it was claimed, in argument, that if the car had stopped before entering upon the switch, and before reaching the place where it would be necessary, in order to have taken the plaintiff on board, the deflection

> might have been prevented. Evidence, therefore, of an injury by failure to stop to allow the plaintiff to get on board, would not have been admissible. Shepard *vs.* N. H. and N. Co., 45 Conn., 54. 'Under the Practice Act, the right to recover rests upon and is limited by the facts alleged in the complaint.' Loomis, J., in Powers *vs.* Mulvey, 51 Conn., 432."

The case of Karr *vs.* Milwaukee Light, Heat, and Traction Company, 132 Wis., 662, involved the question as to whether or not one who in good faith, intending to take passage, has signalled an approaching interurban car in the regular and recognized manner, to which signal the motorman has responded in the usual way by whistling or by setting his brake, is a passenger. In that case an interurban railway maintained between its parallel tracks a device to enable prospective passengers to signal approaching cars at night, directing them, by a sign, to turn on the signal light by holding up a handle until the car came in sight. It was necessary to cross one track in order to operate the signal, and to recross it to enter the car. It was held, that prospective passengers were impliedly invited so to cross and recross the track. Under these circumstances the court held that after giving such signal, a passenger thus impliedly invited to recross the track in order to enter the signalled car was chargeable only with the exercise of reasonable care in so doing and was not necessarily guilty of negligence in failing to look and listen before crossing.

It is apparent that the principle decided in this case has no application to the case at bar. In the case cited the intending passenger had by an act of the railway been invited to do something which a person not intending to become a passenger would not do, to-wit, to cross the track, to use a certain mechanism, and then to return. Under such circumstances the railroad company was held bound to anticipate that an intending passenger

might be at the point in question, and if he were there he would cross and recross the track, and therefore the railroad company was required to use unusual diligence not to injure a person following the directions of the company itself.

There may be other cases cited in which it has been held that an intending passenger becomes such when he lays his hand upon any part of the car. Of course these cases are rightly decided. The conductor is negligent in starting a train before he has ascertained that one intending to take passage upon it is free from the car. He can not run him down if in front of the car nor can he drag him or throw him off if he has hold of the car.

Consideration of all these cases shows how inapplicable they are to the case at bar. Nothing whatever was done by the defendant's servants to the decedent. The car did not move. It was held up for him. In hurrying to board it, which hurry was not caused by the defendant in any way, he stumbled against the fender and fell. It was what any other person hurrying in front of the train or walking deliberately in front of the train might have done. There was no act of commission or omission on the part of the defendant that at all touched him as an intending passenger which would not have equally touched any other person passing in front of the car.

B.

The Doctrine of Res Ipsa Loquitur has no Application to the Case at Bar for the Following Reasons:

The doctrine of *res ipsa loquitur* only applies to a condition of things which presupposes negligence on the part of a defendant.

In the leading case of Kearney *vs.* London and Brighton Ry. Co., L. R., 5 Q. B., 411, 6 Q. B., 759, the plaintiff was passing along a highway under a railway bridge belonging

to the defendant company; it was a girder bridge, resting on a perpendicular brick wall with pilasters, and a brick fell from the top of one of the pilasters on which one of the girders rested and injured the plaintiff; a train had just before gone over the bridge. Cockburn, C. J., said:

> "The company who have constructed this bridge were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now we have the fact that a brick falls out of this structure, and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being loose affords, *prima facie*, a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been from causes operating so speedily as to prevent the possibility of any diligence and care applied to such a purpose intervening in due time, so as to prevent an accident. But inasmuch as our experience of these things is, that bricks do not fall out when brickwork is kept in a proper state of repair, I think where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection, and that care on the part of the defendants which it was their duty to apply."

The philosophy of this matter turns then upon the

unexpectedness of the occurrence. A consideration of the following cases will emphasize this proposition:

In the case of Graeff *vs.* Philadelphia and Reading R. R., 161 Pa. St., 230, a common carrier was sued by one of its passengers because its officers had failed to protect said passenger from acts of rudeness or bad manners on the part of strangers or other passengers. The act consisted in the rude and sudden pushing of a swinging door by one passenger in the face of the first passenger, the plaintiff.

The court say (p. 232):

> "The act which caused the plaintiff's injury was not the act of the defendant nor of any of its agents or employees. It was exclusively the act of a total stranger, over whom or whose actions the defendant had not the slightest control. Moreover, his action was not the usual customary conduct of an intending passenger about to pass through the door in question, but it was rude, impatient, and unusual."

In this case there was no application of the doctrine of *res ipsa loquitur* because the act complained of was not one that could have been anticipated.

An instructive element in the same case was a complaint by the plaintiff that the door in question was improperly constructed and that if it had been properly constructed the accident could not have happened. But the court applied the same principle. On this point the court say (p. 234):

> "A couple of carpenters are examined who, after the event, say the door was defective because it was not all glass above the middle rail, so that persons could see each other coming to the door. It is not at all certain that the same accident would have been avoided if this door had been built in that way, because the same spirit of impatience and rudeness would have prompted the same act of haste in opening the door to get

through quickly, although another person was visible on the other side. But the best illustration of the fallacy of the attempt to establish negligence in this way is afforded by one of our own cases, Hayman *vs.* Pa. R. R. Co., 118 Pa., 508. There the door for the transit of the passengers from the wharf to the boat was constructed precisely as the carpenters said this one should have been, viz, all glass above the middle rail. But it happened that a passenger going through it just behind another passenger put up his hand to push it open, and he struck the glass with force enough to break it, and, his hand having been cut severely by the broken glass, he brought an action against the company and sought to recover upon the presumption of negligence arising from the mere fact of the accident. But we refused to sanction that proposition and held that the door was no part of the machinery used for the carriage of passengers, and that the plaintiff, in order to recover, must prove negligence affirmatively. In that case the accident resulted from the presence of too much glass in the door, and in this case it was contended that there was too little. But both contentions were untenable. The doors were both such as are in common use, and the mere construction of neither of them justified an inference of negligence."

In the case of Farley *vs.* Philadelphia Traction Company, 131 Pa. St., 58, which was an action against a street railway company for negligence, the plaintiff testified that while a passenger on one of defendant's summer cars furnished with transverse seats, he arose to signal the conductor to stop and tripped upon the sheathing of the wheel, extending above the floor but leaving ample room to enter and leave the car, and was thus injured. The court held that in such a case it was not error to enter a judgment of non-suit.

In the case of Atchison, Topeka and Santa Fe Railway

Company *vs.* Calhoun, 213 U. S., 1, the Supreme Court of the United States held in effect that failure to foresee and provide against extraordinary and unreasonable risks taken by other persons can not be regarded as negligence, and that a railroad company was not liable for negligence to one who, in a reckless effort to run after and board a rapidly moving train, stumbled on a truck which had been left by an employee at a place where ordinarily no passengers got on or off the cars.

In this case a woman who was a passenger on the train with a little boy was informed that the train had reached the station. She went to the platform of a car leading her boy with her. When she reached the platform the train had started up again and she handed the boy to a friend of hers standing upon the station platform. He took the child, handed him to his son whom he had met at the station, returned to the steps of the car and told the woman not to jump off as the car was running too rapidly. Just then a third person ran along the station platform, took the child up in his arms, ran along by the car which was moving all the time with increasing rapidity and attempted without success to return the child to its mother who was standing on the platform of the car. While he was running he stumbled over a baggage truck which had been used in unloading baggage from the train and had been left at the very end of the platform and partly on it, within a few feet of the rails. When he stumbled he lost his hold of the child who fell under the car and was injured. The train consisted of the engine, followed by a mail car, baggage car, express car, smoking car, day coach, in which the plaintiff had been traveling, chair car, and a sleeper, in the order named. The baggage car, therefore, was some distance ahead of any passenger car, and the truck was used at the baggage car and left at or near the point where it had been used.

Mr. Justice Moody, delivering the opinion of the court, says (p. 7):

> "Where in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause, and the other as the remote cause. Insurance Company *vs.* Tweed, 7 Wall., 44, 52. This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor. Nevertheless, a careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which according to the usual experience of mankind is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man.
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> (Page 9:) "It can not be doubted that the conduct of Jones (the young man who ran with the child) was careless in the extreme, though doubtless the motives which impelled him were good. But it is urged that Jones' negligence concurred with the negligence of the defendant in leaving the truck where it did, and that therefore both are responsible for the consequences. There is no doubt that the act of Jones and the act of the defendant with respect to the truck concurred in causing the injury, and we assume that if the defendant failed in its duty by leaving the truck at the end of the wooden platform the verdict can be sustained. Washington & Georgetown Railroad *vs.* Hickey, 166 U. S., 521. It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there.

But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that 'if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.' Pollock on Torts, 8th Ed., 41.

"In judging of the defendant's conduct, attention must be paid to the place where the truck was left. If it had been left where the passengers were at all likely to get off or on the train, and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad. On the other hand, if it had been left a mile from the station, where by no reasonable hypothesis passengers would attempt to get off or on the train, there could be no doubt that the railroad would not be responsible in such a case. There was a wooden platform by the track at the station 100 feet more or less in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from seventy-five to one hundred feet with the purpose of boarding a train moving with increasing rapidity,

> much less that a person would take a helpless infant and while thus running attempt to place it on the train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence."

In the case of Chittick et al. *vs.* Philadelphia Rapid Transit Company (Supreme Court of Pennsylvania), 73 Atlantic Reporter, p. 4, the court decided that a street railway company is not liable for accidents of such an extraordinary character that they could not have been anticipated as a natural result of the negligent act complained of.

> See, also, case of Hasbrouck *vs.* Armour & Company, 121 Northwestern Reporter, 157.

In the case of Seddon *vs.* Bickley, appellant, 153 Penna. St., 271, the court say (p. 275):

> "The case then is simply this, that a passenger on a steamboat stumbled over a gang plank of ordinary construction, and lying on the deck of the vessel in close proximity to the place where it must be used, and there was no proof that it was negligently or unusually constructed or handled, nor any other proof of any specific negligence of the defendant which produced the plaintiff's fall. We can only regard the case as a mere accident not induced by negligence and therefore without remedy in damages. . . . So here a gang plank properly constructed, as far as the evidence goes, lying on the deck where it had to be and in its usual position according to the testimony, and being a necessary appliance of the business, can not, without more, confer a cause of action merely because a passenger falls over it. As well might it be claimed that if the plaintiff had stumbled over a coil of rope, or a snubbing block, or a chair in the saloon, she could recover damages for the fall without proof of specific negligence."

In the case of Stewart & Co. *vs.* Harman, 108 Md., 446—

> "one of the duties of the plaintiff, an employee in defendant's store, was to open in the morning and close in the evening the large windows on one of the floors of the building. There was in each window a single pane of heavy plate glass, and the window was opened and closed by means of fixed pivots at the top and bottom. Plaintiff had been doing this work for some months when on one occasion, immediately upon his closing a window, broken glass fell from it upon him, causing the injuries to recover damages for which this action was brought. There was no evidence to show how the glass was broken. It was proved that the window had been properly constructed in the first place, and that at the time of the accident, the strips or beads which held the glass in the frame were in good condition. Afterwards, strips slightly different in character were put in the window. Plaintiff alleged that the defendant had failed in his duty to maintain the window in good condition. *Held*, that the mere happening of this accident creates no presumption of negligence on the part of the defendant, and the maxim *res ipsa loquitur* has no application; that there is no evidence that the injury was caused by defective beading around the glass; that the plaintiff had daily opportunity to observe the condition of the window, and that it was his duty to do so; that defendant was not bound to establish a system of independent inspection, and that consequently the evidence is not legally sufficient to go to the jury to entitle the plaintiff to recover."

The court say (p. 454):

> "To test the soundness of plaintiff's contention, let us suppose that the whole pane had fallen out, unbroken, and had struck and injured the plaintiff on the first day of his employment. The reasonable inference is that such an accident could only

have happened from some defect in the window, and the mere fact of its falling whole and entire from the sash, would be evidence of such defect, and in the absence of satisfactory explanation by the defendant, it would speak against him as to the exercise of due care on his part. In such a case the rule would be applicable, because it could be fairly and reasonably inferred from the circumstances themselves that negligence on the part of the defendant in properly constructing or in properly maintaining the window caused the accident. But in this case the glass was broken into 'a thousand pieces', to use the expression of the plaintiff, before it fell, and such breaking may have been caused by its being struck with a piece of furniture, in moving it, during the day, or by the force of the wind, or, as seems most likely, by its being shut with too great violence by the plaintiff himself. If it occurred under any of these circumstances the defendant would not be liable, because the plaintiff was in charge of the window and had opened and shut it daily for five or six months in absolute safety, and if there were defects in the window and he failed to discover them, or if he broke the window by shutting it too violently, in either event his own negligence was the cause of the injury, and he could not recover."

This whole subject is exhaustively dealt with in a note to the case of Elizabeth McGinn *vs.* New Orleans Railway & Light Co., appellant, in 13 L. R. A. (N. S.), p. 601. The note begins on page 601 and continues to page 623. At page 602 the general doctrine is announced, as follows:

> "By a decided weight, the decisions uphold the doctrine that proof of mere injury to a passenger without more, does not raise a presumption of negligence against the carrier. It is necessary for the plaintiff to show an accident from which the injury resulted, or circumstances of such a character as to impute negligence."

Of the many authorities cited in support of this proposition, the following are selected:

Benedick *vs.* Potts, 88 Md., 52:

> " 'In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. . . . The injury, without more, does not necessarily speak or indicate the cause of that injury—it is colorless; but the act that produced the injury, being made apparent, may . . . furnish the ground for a presumption that negligence set that act in motion.' "

Hite *vs.* Metropolitan Street R. Co., 130 Mo., 132:

> "The mere fact that a passenger on board a train of cars was found to be injured, with a bullet hole through his brain, or a limb broken, would raise no presumption of negligence on the part of of the carrier."

Thomas *vs.* Boston Elev. R. Co., 193 Mass., 438:

> "Proof of an injury to a passenger, caused by her dress catching as she was alighting from a car, is not sufficient to establish a presumption of negligence, in the absence of evidence of any defect in platform, or of any just ground for inferring that, according to ordinary experience, the accident might not have occurred without negligence on the part of the carrier."

Wilbur *vs.* Rhode Island Co., 27 R. I., 205:

> "So where, while alighting from a car, the heel of a passenger's shoe was caught in the running board and torn off, and the passenger thrown to the ground and injured, this does not raise a presumption of negligence against the carrier. It would be necessary for the plaintiff to go farther, and show some circumstances attendant upon the accident, of such a character as to justify the jury in inferring negligence as the cause of the accident."

At page 605 of this note is given a long list of accidents, the happening of which authorizes the application of the doctrine *res ipsa loquitur*. This list is too long to cite here, but a reference to it will show that the case at bar is not within the principle of *res ipsa loquitur*. The general headings show this. For example, the cases are grouped as follows:

Derailments; collisions; sudden starts; sudden stops; jerks; jolts; curves; escaping electricity; explosions; falling objects; acts of employees; ordinary operations.

The cases cited at page 617, under the last head of "Ordinary Operations," are especially to be noted. Among them may be cited the following:

> "Negligence will not be presumed against a carrier merely because there has been an accident, if what was done, or omitted to be done, was not in itself improper."
>
> Illinois C. R. Co. *vs.* Hobbs, 58 Ill. App., 130.

"A presumption of negligence will not arise from an injury to a passenger resulting from a coupling made in the usual and ordinary way."

Yazoo & M. Valley R. Co. *vs.* Humphrey, 83 Miss., 721.

Herstine *vs.* Lehigh Valley R. Co., 151 Pa., 244.

"*Prima facie* proof of negligence does not arise from injury to a passenger, caused by his coming in contact with a post maintained by the company near the track, when it was necessary to the operation of the road."

Allen *vs.* Northern P. R. Co., 35 Wash., 221.

"A presumption of negligence does not arise when a passenger, in attempting to alight from a car, was injured by attempting to use a board as a step when the board was not meant to be so

used, but was intended for a guard, and would be readily understood to be for that purpose by anyone who observed it."

Keller *vs.* Hestonville, M. &. F. Pass. R. Co., 1 Pa. Dist. R., 197.

"Where, after a car had gone through a switch in an ordinary manner, a passenger who had been riding on the rear platform was seen lying on the track injured, no presumption of negligence arises."

State, use of Charles, *vs.* United R. & Electric Co., 101 Md., 183.

"And, where a passenger on a switch-back railway fell out of the car in some unexplained way as it was going through a tunnel, when nothing appeared to be out of order in connection with the railway, no presumption of negligence arises against the carrier."

Benedick *vs.* Potts, 88 Md., 52.

"Negligence will not be presumed where a passenger caught his foot in an appliance in universal and common use, and was thereby thrown from the car."

Werbowlsky *vs.* Ft. Wayne & E. R. Co., 86 Mich., 236.

"Evidence that, where a train rounded a curve at a speed not usually considered dangerous, a passenger in a dining car was thrown off her chair and injured, but no other passengers were so thrown, and light articles were not thrown from the tables, does not fall within the rule of *res ipsa loquitur*."

Nelson *vs.* Lehigh Valley R. Co., 25 App. Div., 535, 50 N. Y. Supp., 63.

C.

The Doctrine of Res Ipsa Loquitur Has No Application in This Case, Because the Facts Are Undisputed, and the Plaintiff Must Show the Particular Act of Negligence Relied On.

In the case at bar the plaintiff has not seen fit to rely, either in her pleadings or in her proof, upon facts which would establish a *prima facie* case against the carrier. On the contrary, she has set out in the pleadings and has adduced testimony in the proof tending to show exactly the particular acts of negligence complained of.

Upon this point it is said by an authoritative writer (Hutchinson on Carriers, 3d Edition, sec. 1415) as follows:

> "And where the plaintiff, instead of resting on the proof of facts which would establish a *prima facie* case against the carrier, as for instance a derailment of the carriage, proceeds to show by his own testimony just how the accident happened, such testimony must tend to prove that the accident was due to the carrier's negligence or he will not be entitled to recover."

The case of Sharkey *vs.* Lake Roland Railway Co., 84 Md., 163–167, is directly in point.

"There is no difficulty about the law applicable to the facts just set forth. There being direct evidence of the cause of the injury there is no room for the invoking of a presumption in regard to it, because the proof of the fact rebuts the presumption."

Andrew's case, 39 Md., 329.

P. W. & B. R. R. Co. *vs.* Stebbing, 62 Md., 518.

The exact point was decided in the case of Charles A. Buckland *vs.* New York, New Haven and Hartford R. R. Co., 181 Mass., p. 3. The court say (p. 4):

> "If we assume that the plaintiff was a passenger, and might have rested his case by showing

that the car in which he was riding was derailed, thus making out a *prima facie* case, he did not choose to do so, but went on and showed by his own witnesses just how the accident happened. Unless, therefore, the evidence put in by him tended to show negligence on the part of the defendant, he was not entitled to go to the jury. Winship *vs.* New York, New Haven & Hartford R. R., 170 Mass., 464.

"The declaration alleges that the derailment of the train was caused by reason of the defective condition of the roadbed, tracks, switches, switching appliances, signals, signal connections, and ways and works of the defendant, and that the defective condition was caused by the negligence of the defendant.

"An examination of the evidence fails to show any evidence of negligence on the part of the defendant."

It is sufficient for the plaintiff to charge, in general terms, that he was injured while being carried as a passenger, as a result of the negligence of the carrier. But, when he chooses to allege in his petition the specific acts of negligence of which he complains, he assumes the burden of proving them, and, as in other cases, must recover, if at all, on the negligence pleaded.

Hamilton *vs.* Metropolitan Street R. Co., 114 Mo. App., 504, 89 S. W., 893.

Where specific acts of negligence are specifically described in an action by a passenger against a carrier for injury, and are the gist of the action, a presumption of negligence does not arise against the carrier, but the plaintiff must prove his allegations.

Chicago Union Traction Co. *vs.* Leonard, 126 Ill. App., 189.

In the case of Haralson *vs.* San Antonio Traction Co.,

Court of Civil Appeals of Texas, 115 S. W. Rep., p. 876, the court say:

> "The plaintiff could only recover upon substantially proving the facts which she alleged as her cause of action. The fact that an injury is negligently caused one while attempting to alight from a standing car is obviously different from the fact that the injury was negligently caused when he was in the act of stepping from a moving one. As is said in El Paso Electric Ry. Co. *vs.* Boer (Tex. Civ. App.), 108 S. W., 201: 'The only ground of negligence alleged was that the car was standing still when plaintiff started to alight therefrom, and that while in the act of alighting it was suddenly started forward without warning, and he was thereby caused to fall to the ground and was injured. This allegation would not admit of proof, or authorize the submission as an issue, that the car was in motion when plaintiff started to alight from it, and that its speed was suddenly increased; for the pleadings . . . raise no such issue. . . . If the car was moving when plaintiff first attempted to leave it, such fact necessarily showed it was not standing when he made the attempt, and thereby disproved the only act of negligence alleged as plaintiff's cause of action.'"

It follows from this that where the plaintiff alleges and offers testimony tending to prove a definite state of facts from which negligence, as he avers, is to be found by the jury, he can not rely upon the doctrine of *res ipsa loquitur* or any presumption of negligence based upon other facts than those which appear in his pleadings and proof.

On this point see, also, the case of Roanoke Railroad Co. *vs.* Sterrett, 108 Va., 553.

See, also, cases cited in 4th American Digest (Decennial Edition), p. 725, sec. 348.

We do not, however, have to rely exclusively upon decisions outside of our own jurisdiction upon this point. In the case of Kight *vs.* Metropolitan Railroad Company, 21 App. D. C., p. 494, the opinion of the late Chief Justice Alvey, speaking for a unanimous court, is authoritative upon this subject. That was an action in tort brought by the plaintiff against the defendant railroad company for injuries claimed to have resulted from the negligence of the defendant while the plaintiff was a passenger upon its electric car. Following an explosion in the car in question, which was caused by the blowing out of a fuse box, there was a stampede of the passengers, which resulted in the plaintiff, who was one of the passengers, jumping or being pushed from the car, whereby she was injured. The proof showed (p. 495) "that on the afternoon of September 8, 1900, the plaintiff was a passenger in one of the defendant's open electric motor cars drawing a trailer northward and up grade, on Fourteenth street, between New York avenue and H street, N. W., and pushing a large, heavy disabled car up the grade, in order to clear the tracks and open the way for the car in which the plaintiff was riding. As the leading car was about to round the curve into H street, a loud report was heard and a flash or flame was instantly seen to rise from the portion of the car near or about the controller and near to the seat occupied by the plaintiff. The rear fuse box of the car had been blown out, causing an instantaneous flash or flame, and which disabled the car. The flash, as seen by the witnesses, was variously estimated; some saying it was two or three feet high, and others that it extended to the top of the car. The explosion and flame were followed by a slight charring or ignition of the woodwork of the car, extending up to and around the running-board. The flame was soon extinguished, and before much damage was done the car. The report and outburst of flame produced a stampede of

the passengers on the car, and the plaintiff, who was sitting on an end seat in the back of the car, either jumped from the car, or was pushed therefrom by the passengers crowding behind her, and fell upon the pavement and received serious injuries, for which she brought this action."

Counsel for the plaintiff contended (Rec., p. 500) that the evidence raised a presumption of defendant's negligence; that the practically unanimous concurrence of modern authority maintains the rule that proof of injury to a passenger, resulting from some accident to the means of conveyance or from some occurrence of an unusual, abnormal or extraordinary character connected with its operation, presents a *prima facie* case of negligence on the part of the carrier, even though the specific nature of the accident be unknown and the reason for it unexplained.

Mr. Chief Justice Alvey said (p. 508):

> "The plaintiff contends that the general principle or rule of presumption that is sometimes applied in actions to recover for injuries received by alleged negligence, of *res ipsa loquitur*, applies; and that the nature of the accident itself furnishes ground for the inference that there was negligence or unskillfulness, or otherwise the accident would not have occurred. That rule of presumption is always applied with caution, *and only where there is an absence of positive proof of any definite act of negligence or want of skill*, though the accident itself is of *an unusual and extraordinary character* and one that would not likely occur without such cause. In such case, the presumption arising, *the onus of explanation* is imposed upon the defendant. But in this case there are circumstances, apart from the nature of the accident itself, that would indicate that there was negligence or want of skill in the control and management of the car that was the direct cause

> of the accident: That the current was too suddenly fed to the motor, and thus the explosion and flame were produced."

We have here the explicit declaration of the court that it is only in a case where there is an absence of positive proof of any definite act of negligence, or want of skill, that the presumption arises. Indeed, the rule could not be otherwise. The reason upon which *res ipsa loquitur* rests, as well as the presumption of negligence from circumstances in the case of a passenger, is this: It is assumed that because the accident happened there must have been some negligent act which caused it. Now, wherever the pleadings and the evidence of the plaintiff, or the evidence alone, show what the negligent act was, there can not be any reason for indulging in a presumption with respect to it. This dilemma is inevitable. Either the presumption would assume the acts themselves in evidence, which are the only negligent ones that can be considered (and such an assumption would be in all cases superfluous and useless, because no assumption can be made in the face of the facts themselves); or, taking the other horn of the dilemma, the presumption must assume other facts than those which are disclosed in the evidence, and on these no recovery can be had, because the claim is that the acts in evidence are the negligent ones and caused the accident, and no presumption can ever be made against the actual proof.

To give a concrete illustration: there is no pretense on the part of the plaintiff in the case at bar that there was any other negligent act on the part of the defendant than the having an improper fender at the place and time in question. Now, even were there evidence in this case of that fact (which there is not) and the presumption related to this fact, this presumption would be useless, because the fact itself would be in evidence, and

the jury would have to find whether or not it existed. If, on the other hand, the presumption is made to apply to something else, to some other imaginary act of negligence, then the presumption would be absolutely against the proof and against the truth.

To put this in common language: When men presume something they virtually say: Let us take this for granted. But when there is testimony with respect to the thing that is to be taken for granted, it would be both a useless and an illegal thing to take it for granted. The test of the truth is whether it is proved or not, and of that the jury must be the judge. If it is proved, it can not be taken for granted, but if it is not proved, still less can it be taken for granted. The fact of negligence must stand or fall by the proof and not by any presumption one way or the other.

As has been said, this brief has had to assume what the contentions of the appellant upon the hearing of this appeal will be. It has been perhaps unnecessarily prolonged on account of the resulting uncertainty as to those points. On the other hand, it may not have anticipated points which may be made by the appellant, in which event counsel will ask leave to file an additional brief upon such points.

It is not thought necessary here to go into a very important question which will shortly be argued in this court in a pending case, to-wit: the relation of the doctrine of *res ipsa loquitur* to the burden of proof, which is discussed in a note to the case of Cleveland, Cincinnati, Chicago & St. Louis Railway Co., appellant, *vs.* Vivian Hadley (Supreme Court of Indiana), 16 L. R. A. (N. S.), p. 527. The note begins at page 527 and continues to page 531. It is not thought that this question is involved in the case at bar, and counsel are unwilling to impose upon the court the duty of considering unnecessarily so important a question.

In conclusion, it is submitted that upon the pleadings and evidence in the case at bar there is no proof of negligence, and no presumption which would render such proof unnecessary. Therefore the court below committed no error in directing a verdict for the defendant.

Respectfully submitted.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
G. THOMAS DUNLOP,
Attorneys for Appellee.